Supreme Court, U. S.
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80-373

NUMBER_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

STANLEY DRIZIN, WILLIAM A. KILPATRICK, JOHN JEWELL, MYRON BJERKAAS, FRANCES GRAHAM, DECLAN J. O'DONNELL, RICHARD PETERMAN and JOHN H. PETTINGILL; and BLACKFOOT BITUMINOUS, INC., and P & J COAL COMPANY, INC.

PETITIONERS,

VS.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States and to the Associate Justices of the Supreme Court of the United States:

Petitioners herein pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered on June 9, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the pronouncement by the Securities and Exchange Commission in its regulations, 17 C.F.R. §202.5(a), purportedly a "description" of its procedures generally followed, but which states that its standard mode of formal investigation with use of subpoenas may be evoked when it appears that "there is a likelihood" that a violation of securities law has been or is about to be committed, should be considered a substantive rule which requires for judicial enforcement of subpoenas that the agency be able to make a showing of such "likelihood" in fulfillment of requirements of due process.

2. Whether an agency seeking judicial enforcement of its investigative subpoenas must be able to show not only a legitimate purpose, the relevancy of the testimony and documents summoned, and satisfaction of administrative requirements, but also that the material sought is not already within the agency's possession, pursuant to *United States v. Powell,* 379 U.S. 48 (1964) and as affirmed by another Court of Appeals, that of the Second Circuit, in 1979.

3. Whether an agency seeking judicial enforcement of its investigative subpoenas may, by its formulated recitation of "relevancy and materiality", avoid a finding of oppressiveness or unreasonable search in its demands for each and every document, including all correspondence and other writings otherwise unidentified and undescribed, which relate to the respondent personally.

Reasons asserted for allowance of the writ (*cf.* Rule 17.1)

are stated at the commencement of each argument upon the questions presented.

PARTIES IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Under Supreme Court Rule 19.4, this is a single petition for writ of certiorari covering two cases sought to be reviewed from the Court of Appeals for the Tenth Circuit; both cases were disposed of by that court's single judgment and opinion involving closely related questions:

No. 79-1130, in which the Securities and Exchange Commission was applicant-appellee; Colfax National Bank (with separate counsel throughout) was respondent but never an appellant; and Stanley Drizin, William A. Kilpatrick, John Jewell, Myron Bjerkaas, Frances Graham, Declan J. O'Donnell, Richard Peterman, and John H. Pettingill, and P & J Coal Company, Inc. were respondents-appellants; and

No. 79-1131, in which Blackfoot Bituminous, Inc., and P & J Coal Company, Inc., were plaintiffs-appellants, and the Securities and Exchange Commission was defendant-appellee.

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The slip opinion of the Court of Appeals of June 9, 1980, not yet reported, is printed in Appendix A hereto. *And see* Fed. Sec. L. Rep. (CCH), Current Vol. ¶ 97,532 (1980).

The two written Final Judgments of January 29, 1979, of the United States District Court for the District of Colorado, not yet reported, are printed in Appendix B hereto, comprising its judgment in consolidated Nos. 78-F-1149 and 78-F-1247 (which became the Court of Appeals No. 79-1130) and its judgment in No. 79-F-56 (which became the Court of Appeals No. 79-1131). Further, the transcribed ruling from the bench by said district court, at the hearing of January 26, 1979, which determined all three cases, is printed in Appendix C hereto; it was designated (App. B, p. 2) by the district court for incorporation by reference in its Final Judgments, *supra,* as the findings and conclusions on facts and law.

GROUNDS FOR THIS COURT'S JURISDICTION

The date and time of entry of judgment sought to be reviewed was June 9, 1980.

This petition for writ of certiorari to the Court of Appeals is brought pursuant to 28 U.S.C. §§1254(1) and 2101(c).

CONSTITUTIONAL, STATUTORY, REGULATORY PROVISIONS

Set forth in Appendix E hereto are the constitutional, statutory, and regulatory provisions involved:

The Fourth Amendment, and the "due process" clause of the Fifth Amendment, of the Constitution of the United States.

Securities Act of 1933, 15 U.S.C. §§77s(b), 77t(a), 77v(a)(b) (1976).

Securities Exchange Act of 1934, 15 U.S.C. §78u(a)(b)(c) (1976).

Volume 17 Code of Federal Regulations, *Commodity and Securities Exchanges*, §§200.54, 200.66, 200.401(f), 202.1(c), 202.5(a)(b)(c)(d) (1978; 1979).

STATEMENT OF THE CASE

Judicial enforcement of investigative subpoenas duces tecum issued by regional officers of the Securities and Exchange Commission in Denver, Colorado; with simultaneous denial of declaratory relief in a counter suit brought by two of those subpoenaed to enjoin the investigation.

A. *The Judgment Sought to be Reviewed*

The present judgment of the Court of Appeals for the Tenth Circuit (Appendix A) covers its cases Nos. 79-1130 and 79-1131.

Number 79-1130 affirmed two judgments of the United States District Court for Colorado which required these petitioners, except for Blackfoot Bituminous, Inc., to appear in the Commission's Denver regional office to testify in response to Commission subpoenas in a formal private (also called "nonpublic") investigation into possible or potential violations of the federal securities laws, and to produce records and documents described in the subpoenas. Those two judgments of the district court were in its consolidated Nos. 78-F-1149, *Securities and Exchange Commission, Applicant v. Blackfoot Bituminous, et al.*[1], and 78-F-1247, *Securities and Exchange Commission, Applicant v. P & J Coal Company, Inc., et al.*[2], (*See* Final Judgment, App. B, pp. 1-8).

Number 79-1131 affirmed the judgment of the same court in its closely connected No. 79-F-56, *Blackfoot Bituminous, Inc., and P & J Coal Company, Inc. v. United States Securities and Exchange Commission*[3] this latter judgment being dismissal of a counter suit, by two of those subpoenaed, attempting to enjoin the investigation into their affairs. (*See* Final Judgment, App. B, pp. 9-10).

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[1] Filed November 1, 1978.

[2] Filed November 28, 1978, and eventually consolidated with the foregoing No. 78-F-1149 by order of February 7, 1979 (R. I, p. 151).

[3] Filed January 18, 1979 (No. 79-1131, R. I, pp. 1-5).

The records on appeal to the Court of Appeals are in Volumes I, II and III for No. 79-1130, and Volumes I, II, and III for No. 79-1131. Volume I in each case comprises the pleadings, motions, and filings for the case. Volume II is identical for each case, and is printed as Appendix C herein: the transcript of the trial court's ruling from the bench on January 26, 1979. Volume III is also identical for each case: the Commission's original "Order Directing Private Investigation and Designating Officers to Take Testimony", of August 2, 1978. Citations to the record will be to "R." with volume and page numbers, or to the Appendices herein setting forth the judgments of the Court of Appeals (App. A) and the district court (App. B, C).

B. *The Investigative Order*

On August 2, 1978, the Commission, pursuant to Section 20(a) of the Securities Act of 1933, 15 U.S.C. §77t(a), and Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(a), issued an order (R. III, pp. 1-3) directing a formal private investigation of Blackfoot Bituminous, Inc. ("Blackfoot"), P & J Coal Company, Inc. ("P & J") and its subsidiary, Stanley Drizin, John H. Pettingill, and others, to determine whether those persons or others "have engaged or are about to engage" in any acts or practices "in possible violation" of federal securities laws, namely Sections 5(a), 5(c), and 17(a) of the Securities Act of 1933, 15 U.S.C. §77e(a), 77e(c), and 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b) and Rule 10b-5 thereunder, 17 C.F.R 240.10b-5 (R. III, pp. 2-3).

The order states that the Commission's official file shows that no registration statement had been filed under the Securities Act by Blackfoot concerning any of its securities, and states further that members of the Commission staff "have reported information which tends to show" that Blackfoot, P & J, Stanley Drizin and others have been offering to sell, and selling and delivering to the public, certain securities in the form of sublease interests in coal mining properties, (*id.* p. 1), and that "such persons" had made misleading statements or omissions, as to material facts, in the offer and sale of such securities, concerning some ten fac-

tors relating to, for example, coal production, tax consequences, and financing (*id.* pp. 1-2). The order concludes by authorizing and designating its officers to conduct the investigation (*id.* p. 3).[4]

Thereafter, in August and September 1978, those staff members issued subpoenas duces tecum to the petitioners herein, who failed or refused to appear in response. Action in the district court followed.

C. *Proceedings in District Court*

On November 1 and 28, 1978, in this court of first instance, the Commission filed its two actions previously specified, notes 1 and 2 and accompanying text, *supra* (R. I, *Applications for Orders to Require Obedience to Subpoenas,* pp. 1-15, 60-66; subpoenas, *id.* 16-49, 67-80), pursuant to Section 22(b) of the Securities Act of 1933, 15 U.S.C. §77v(b), and Section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. §78u(c). The court issued its orders to respondents to show cause why the subpoenas should not be complied with (R. I pp. 58-59, 94-95).

The respondents served ten interrogatories (*cf.* F.R.C.P. 33) and two requests for documents (*cf.* F.R.C.P. 34) upon the Commission.[5] The interrogatories aimed principally at unearthing the testimony and documentation known to the Commission as the basis of a "likelihood" of violations when

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[4] It should be noted, with regard to R. Volume III, the Commission's order of August 2, 1978, *supra,* that a copy thereof was filed in the district court and was there placed under seal by that court (No. 79-1130, R. I, p. 149). Following affirmation and remand of the record on appeal by the Court of Appeals to the district court, July 1, 1980, counsel for petitioners discovered that the sealed envelope containing the order had been opened and left open. This apparently occurred during the appellate proceedings and while the record was before the Court of Appeals.

[5] The record on appeal from the district court apparently inadvertently omitted the entirety of the interrogatories and requests, and the responses thereto. They did appear, however, as an exhibit attached to the main Brief of Appellants, were not objected to by either the Appellee (Commission) or the Court of Appeals, and remained so attached. *See* Brief of Appellants, pp. 22-31, Tenth Circuit Nos. 79-1130, 79-1131.

it voted for the investigative order of August 2, 1978, *supra*. The interrogatories sought a list of documents considered by each commissioner prior to the order, the names of witnesses whose statements or testimony were considered prior to the order, the names of witnesses whose statements or testimony were considered by the commissioners, and itemization of the significant facts pertinent to the suggestive recitals in the order which were substantiated by documentation or testimony (Interrogatories Nos. 4, 5, 6). In particular: Interrogatory 9 inquired as to what the nature of the likely violations might be, and who would have been involved therein; and No. 10 inquired whether any complaints had been made by members of the public against respondents Drizin, Pettingill, Blackfoot, or P & J, and if so, the nature of each complaint.

The requests for documents were for (1) a copy of the Commission's order of private investigation, *supra*, and (2) copies of the documents considered by any commissioner prior to or relative to the issuance of said order.

The Commission objected to the interrogatories, principally on grounds that respondents were improperly attempting to inquire into the applicant's "motives" in commencing the investigation. As for the requests for documents, the Commission's only response (other than objections to furnishing investigative documents) was to furnish a copy of its order of August 2, 1978 (R. III) to respondents' counsel; that copy bore a notation at the bottom of its page 1:

> This order directing a private investigation has been furnished to James L. Treece, Esq., Robert C. Ripple, Esq., and James A. Dierker, Esquire, at their request pursuant to Rule 34 of the Federal Rules of Civil Procedure and it should be understood that the Commission has not determined whether any of the persons or companies mentioned in the order has committed any of the acts described or has in any way violated the law.
> R. III, p. 1.

The respondents filed a motion to compel responses and answers (R. I, pp. 112-115). The district court denied the motion, ruling that matters which might have caused the Commission to commence an investigation were not discoverable (R. I, p. 119), and subsequently concluding formally in its findings that "the Court will not go behind the formal order of investigation in a subpoena enforcement proceeding" (App. C, p. 6).

The respondents' attempts at discovery were prompted in part, as they later argued on appeal, by the language from the Commission's regulations, 17 C.F.R §202.5(a), which sets out Commission steps to institute a formal investigation

> when it appears...that there is a likelihood that a violation has been or is about to be committed....

Their attempts were, in short, aimed at discovering whether or not the Commission actually had factual information supporting such a "likelihood", prior to its issuance of the investigative order on August 2, 1978. Their answers in the two Commission suits (R. I, pp. 96-101, 107-111) had asserted inter alia that there had not been information of such "likelihood;" that the subpoenas were issued merely in hopes of turning up evidence of wrongdoing; that the subpoenas failed to specify or identify properly the documents sought; and that they were unduly burdensome in scope and effect of required compliance.

On January 18, 1979, respondents Blackfoot and P & J filed a counter suit to procure an order of rescission of the subpoenas and the investigation, District of Colorado No. 79-F-56, note 3 *supra* (Court of Appeals No. 79-1131, R. I, pp. 1-5). Its main objects included the pending subpoenas, and posed issues essentially the same as those raised by the disputes in the Commission suits (*id.*, complaint pp. 3-4, paras. 18-28).

The district court made one dispositive bench ruling, at the hearing of January 26, 1979 (App. C) designating it as its findings and conclusions on facts and law (*id.* p. 13), and incorporating it into its two Final Judgments of January 29 (App. B). The decisions were, with one exception, [6] in favor

[6] The exception in the judgment to enforce subpoenas was Blackfoot

of the Commission as the applicant to enforce its subpoenas (App. B, pp. 1-7; App. C, pp. 2-13; 14). As for the suit by Blackfoot and P & J against the Commission, *supra,* the court considered the claims, and accepted a stipulation by counsel that the plaintiffs agreed to "suffer an adverse judgment" therein because of the effects of *res judicata* or collateral estoppel from the court's judgment in enforcing the subpoenas; thereupon the court denied all relief and entered judgment for the Commission (App. B, pp. 9-10; App. C, pp. 14-16). Stays of enforcement of the two judgments beyond March 1979 were sought, unsuccessfully. The investigation remains ongoing at the time of this petition for writ of certiorari, and in fact the Commission has issued subpoenas to at least two additional entities since the appellate processes were undertaken by petitioners. Blackfoot, which suffered adverse judgment in the Court of Appeals No. 79-1131, *supra,* apprehends that it, too, faces such subpoena in absence of a remedy from this Court.

The Final Judgment of the district court specifies the scope and extent of the subpoenas (App. B, pp. 3-7). They require, for the period January 1, 1977 to date, that inter alia:

Petitioners (respondents) Kilpatrick, Jewell, Bjerkaas, Graham, O'Donnell, and Peterman must produce "each and every" document and record, otherwise undescribed, relating to himself, by specific listing of each petitioner's own name among the fourteen entities about whom information is sought. The categories of documents range from "correspondence" through "lists", shareholder and bank records to "reports" and "other writings of every kind and description (whether or not actually used)." (App. B, p. 5).

Bituminous, Inc., upon a finding that it had not been properly served. The action against it was dismissed without prejudice (App. B, pp. 3, 8; App. C, pp. 10-11, 13), and Blackfoot remains subject to service of a subpoena duces tecum upon it in the same investigation, which remains ongoing. Blackfoot as plaintiff in the respondents' counter suit, No. 79-1131, *supra,* became an appellant, when the district court denied relief therein, upon its findings in the principal case, No. 79-1130.

D. *The judgment of the Court of Appeals*

Appendix A is the judgment and opinion of the Court of Appeals.[7]

The opinion states (*id.* p. 3) in its recital of facts that the subpoenas "required production of certain corporate records of Blackfoot Bituminous and any other entity engaged in the production of coal lease programs." It then pronounces immediately that to obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met, citing *United States v. Morton Salt Co.,* 338 U.S. 632 (1950).

The appellants contended that the language of the Commission's own regulations at 17 C.F.R. §202.5(a) required the agency to establish that, as to the securities laws, there was a "likelihood that a violation has been or is about to be committed" in order to support the issuance of subpoenas and their judicial enforcement (App. A, p.4). The Court of Appeals rejected that contention, holding that the regulation, Section 202.5(a), was "descriptive only", pursuant to a preceding section, part 202.1(c). It held further that assuming without deciding that the description contained in that regulation should be treated as a rule, it (the court) did not equate a likelihood of violation with "probable cause", and would not impose safeguards which, it believed, were not imposed by *Morton Salt, supra,* and *United States v. Powell,* 379 U.S. 48 (1964). The court referred to *Powell* as holding, 379 U.S. at 51, that "the government [the Internal Revenue Service] need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process...." (App. A, p. 5).

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[7] The opinion's opening sentence (page 2) refers to enforcement of "two" subpoenas. There were nine subpoenas, to these petitioners, under appellate review from the district court's Final Judgement (App. B, pp. 3-7, excluding the respondent Colfax National Bank, which did not appeal the judgment.)

As to the contention of the appellants that the Commission had failed to fulfill another requirement of *Powell, supra,* namely a showing that the agency did not possess the information it sought by subpoena, the Court of Appeals found such unnecessary to decide, since the appellants had failed to identify the items which they contended were in Commission possession, and, furthermore, since there had been no registration statement filed, the Commission would not have had access to documents through that source (*id.* p. 6).

The opinion also rejects the appellants' contentions that the subpoenas were excessive and unfairly burdensome (*ibid*). It concludes by declining to consider the appellants' contention that it was error for the district court to deny their motion to compel discovery by interrogatories and requests for production of documents, since the allowance of such discovery hinged upon a finding — now rejected — that the aforementioned 17 C.F.R. Section 202.5(a) required the Commission to furnish a showing of a "likelihood" of some violation, past or potential, as support for its investigation enforcement (*id.* pp. 6-7).

The enforcement judgments (App. B) were affirmed. As for the counter suit, the declaratory judgment action by the respondents: the court affirmed its dismissal (App. A, p. 7).

ARGUMENT

I.

The pronouncement by the Commission in its regulations, 17 C.F.R. §202.5(a), purportedly a "description" of its procedures generally followed but which states that its standard mode of formal investigation with use of subpoenas may be evoked when it appears that "there is a likelihood" that a violation of securities law has been or is about to be committed, should be considered a substantive rule which requires for judicial enforcement of subpoenas that the agency be able to make a showing of such "likelihood" in fulfillment of requirements of due process.

Reasons for allowance of the writ. The Court of appeals has given a negative answer to an important question of

federal law involving a particular regulation touching due process which has not been, but should be, settled by this Court, and which conflicts with patent implications of applicable decisions of this Court: whether an agency, however it disclaims formality, which publishes a legal standard of evidentiary basis for its formal mode of compulsory process by subpoena shall be required, for judicial enforcement of the subpoena, to make a showing of that evidentiary basis.

A. For the purpose of investigations the Commission or officers designated by it may issue subpoenas for testimony and production of documents. 15 U.S.C. §77s(b). Among the Commission's rules and regulations, in 17 C.F.R. Part 202, "Informal and Other Procedures" (1978, 1979), there appears the following:

202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission, which may then order a formal investigation or examination if it is deemed necessary. Unless otherwise ordered by the Commission, the investigation or examination is nonpublic and the reports thereon are for staff and Commission use only.

That section is preceded by Section 202.1(c):

(c) The statues and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings. These are supplemented where feasible by cer-

tain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. There follows a brief description of procedures generally followed by the Commission which have not been formalized in rules.

Although the Commission's original order (R. III) mentioned in its text only a "possible violation", and only information which "tends to show...", and withdrew to deeper tentativeness with its counsel's note thereon that "the Commission has not determined whether" anyone named therein had committed a violation "or has in any way violated the law" (*id.*, p. 1n.), the district court found that Section 202.5(a) was not a formal rule but only a "description", that "likelihood" did not require "probable cause" in the Commission's information (App. C, p. 6), that in any event the Commission's knowledge of the lack of registration by the involved companies "fulfilled the likelihood of violation or potential violation of the securities laws,"[8] and that the criteria of *United States v. Morton Salt Co.*, 338 U.S. 632 (1950) had been met (*id.* p. 7). The Court of Appeals agreed (App. A, p. 5) — but added, *ibid,* after citing *Morton Salt* and *United States v. Powell,* 379 U.S. 48 (1964):

> We do not believe the SEC, in describing its procedures in 17 C.F.R. §202.5(a), intended to assume a greater burden than the Supreme Court decisions require, and we will not so hold.

B. The assumption-without-deciding by the Court of Appeals (App. A, p. 5) that the asserted element of "likelihood" must require equation with "probable cause" and therefore was to be rejected, does not dispose of the word's effect. "Likelihood", the petitioners believe, has several meanings, but all of them greater in qualitative weight than mere "possibility" — and hence imposing a burden upon the Commission greater than the mere possibilities it confined itself to in its recitals of "possible violation" and "the Commission has not determined... whether any of the persons... has in any way violated the law" in its investiga-

[8] That finding was made without reference to the provision in the Securities Act for exemptions from registration requirements for, *e.g.*, private offerings. 15 U.S.C. §77d(2).

tive order (R. III, p. 1 and notation thereon).

The various meanings of "likelihood" range through at least the following: It is "something more than possible and less than probable", *e.g. Conchin v. El Paso & S.W. RR Co.,* 13 Ariz. 259, 108 P. 260, 262 (1910). It "imports something less than reasonable certainty", *e.g. Ottgen v. Gary,* 41 Ohio App. 499, 181 N.E. 485, 487 (1932). It "means probability, not possibility", *e.g. Nevis v. Pacific Gas & Elec. Co.,* 43 Cal.2d 626, 275 P.2d 761, 765 (1954). It "means probability", *e.g. Clark v. Welch,* 140 F.2d 271, 273n.2 (1st Cir. 1944) (dictum). And "likelihood" and "probability" are synonymous, *e.g. Robinson v. Argonaut Ins. Co.,* 534 S.W.2d 953, 956 (Tex. Civ. App. 1976).

Compare the Commission's "Definitions" relating to its closed meetings which define the term "likely to" as meaning "that it is more probable than not," 17 C.F.R. § 200.401 (f). *And see* the term "probable cause" as required to support a "criminal"-type search warrant: that there be a showing from the information gathered that the underlying circumstances support a neutral magistrate in accepting a conclusion that the wrongful conduct is occurring and that the sources of information be themselves credible and the information reliable, meeting the proposition that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause....", *e.g. Spinelli v. United States,* 393 U.S. 410, 412-13, 419 (1969), and as sought in grand jury indictments: rationally persuasive of the crime charged and provided a substantial basis for the indictment, *e.g. Costello v. United States,* 350 U.S., 359, 364-65 (1956) (*concur. opin.* of Burton, J.).

Petitioners are uncertain of the precise legal meaning of the word "likelihood" in the present publication of the Commission. They assert, however, that it places an evidentiary duty upon the Commission to be able to show the enforcing court that issuance of process in a formal investigation was based on evidence of whatever kind that indicated a probability of a past or potential violation. And that probability should be of evidentiary quality greater than "possibility". This, particularly, when the Commission's subpoenas to respondents are often followed by sub-

poenas to their customers and banks, with the consequent notoriety and upset to business relationships and even ability to conduct business, the Commission knowing the while the frequently damaging effects of such investigations. *See* the Commission's ethical admonitions to itself in the regulations, *supra,* Section 200.66 "Investigations," that "The power to investigate carries with it the power to defame and destroy", and Section 200.54, that "Members shall also carefully guard against any infringement of the constitutional rights, privileges... of those who are subject to regulation."

C. This Court's decision in *United States v. Morton Salt Co., supra,* ought not be held to turn away this contention. *Morton Salt* did not consider the implications of the regulation now at issue, or of any similar language or "description"; it was an injunctive action in the district court by the Federal Trade Commission (F.T.C.) to require the respondents to file special and additional reports of compliance, pursuant to its own regulation requiring compliance reports and incidentally pursuant to a Court of Appeals decree enforcing an adjudicated cease and desist order against violators proven to be such. The F.T.C., although not charging violations of either the decree or a statute, demanded additional reports by its own regulatory authority, not by any language of the court decree. It was held to be acting properly under its duty to inform itself as to the culprits' compliance and to protect commerce against continued or renewed unlawful practices, 338 U.S. at 641. This Court held, as to the power of a regulatory agency (here, the F.T.C.), that

> If the Commission had petitioned the court [of appeals] itself to order additional reports of compliance, it could properly have been required to present some evidence of probable violation to overcome the "presumption of legality," of innocence, and of obedience to the law which respondents here urge....
> 338 U.S. at 640.

That statement, "some evidence of probable violation" when applying to a court for enforcement of regulatory de-

mands, is strengthened by the Court's subsequent reminder that constitutional limitations against unreasonable search and seizure and due process of law apply to agencies, *id.* at 642. The Court held further (as pertinent to this present petition) that the agency action is constitutionally sufficient if (1) the inquiry is within the authority of the agency, (2) the demand is not too indefinite and (3) the information sought is reasonably relevant, *id.* at 652-53; and that before the courts will hold an order seeking "information reports" to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the agency itself to obtain reasonable conditions, *id.* at 652-53. It also reiterated with citations that the Fourth and Fifth Amendments to the Constitution protect corporations as well as individuals from unlawful demands made in the name of public investigation, *id.* at 651-52.

If petitioners here are correct in believing that the Securities and Exchange Commission's regulatory Section 202.5(a) shall be held to require that agency to make a showing of "likelihood" of violation for enforcement of its investigatory demands, then *Morton Salt* (which uses the word "probable" in that context) does not at all require denial of this petition. Indeed, if petitioners are correct, the very requirements by *Morton Salt*, that the inquiry be within the authority of the agency and that due process limitations apply to its demands, have not been met in this case. Furthermore, the fact that a respondent did not become a supplicant to the Commission to modify its demands could not be held to disqualify its resistance thereto in court, where the agency's own self-imposed standard for evidence ought first to be demonstrated. This demonstration should be to the court, for it would be incongruous at the least to require a respondent to render its own judgment from the beginning as to whether, in discussion of demands from the agency, the latter has shown a "likelihood" of violation to support compulsory process.

So also as to the Tenth Circuit Court of Appeals' reference (App. A at 5) to *United States v. Powell*, 379 U.S. 48, 51 (1964), for the conclusion that enforcement of an Internal Revenue Service subpoena required no showing of likeli-

hood of the fraud which that agency suspected. In that case, the respondent tax payer had no such express statement of a regulatory standard of "likelihood" to rely upon, but rather invoked only a section of the Internal Revenue Code which authorized such agency action if the agency thought it "necessary." 379 U.S. at 52-53. The Court declined to equate "necessity" with the "probable cause" demanded by the taxpayer in the enforcement litigation, *ibid*. With the existence of the S.E.C.'s Section 202.5(a) standard, that holding also fails to determine this petition.

D. In its opinion herein, the Court of Appeals stated that it did "not believe the SEC, in describing its procedures in 17 C.F.R. §202.5(a), intended to assume a greater burden than the [foregoing] Supreme Court decisions require, ..." (App. A, p. 5).

But what the Commission "intended" is not the test under judicial scrutiny. The particular label (such as, say, "description" or "informal") that an agency puts upon its given exercise of administrative power is not, for judicial purposes, conclusive; rather it is the substance of what the agency has purported to do, and has done, which is decisive. *Columbia Broadcasting System v. United States*, 316 U.S. 407, 416 (1942); *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 481-82 (2d Cir. 1972); *Aiken v. Obledo*, 442 F.Supp. 628, 648 (E.D. Cal. 1977). Consider the significance of the Commission's statement of "likelihood" of a violation as the basis for a formal investigation with subpoenas: To the businessman — the public — who sees it published just preceding the "Rules Relating to Investigations," 17 C.F.R. Part 203, and nowhere else, it sets an evidentiary standard under due process which a respondent has a right to rely upon and a court should enforce. Pertinent, then, are further statements of the Court in *Columbia Broadcasting, supra*: regulations which affect or determine rights generally even though not directed to any particular person or corporation, when lawfully promulgated by an agency, have the force of law, 316 U.S. at 417. Such an administrative order is reviewable and does not cease to be so merely because it is not certain that the agency will institute proceedings to enforce the penalty incurred thereunder, *id*. at

417-18. Unlike an administrative order or court judgment adjudicating the rights of individuals, the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual, *id.* at 418. It is scarcely an effective rejoinder to say that the regulation here at issue need not even have been published because of being the type which is not substantive[9] and hence exempt from the notice and hearing requirements of the Administrative Procedure Act, 5 U.S.C. §553(b)(3)(A): namely an "interpretative rule", "general statement of policy", or "rule of agency procedure" — or, as the Commission prints it, "informal procedures" or "not formalized." Those are mere labels and not determinative, particularly where (1) the Commission's introduction states that the very procedures described are "designed to aid the public" and are those "generally followed by the Commission", 17 C.F.R. §202.1(c); (2) the two types of investigation ("preliminary" and "formal") are distinctly, separately described, together with the distinct evidentiary basis for each, *id.* §202.5(a); (3) proceeds to outline still more Commission requirements which obviously demand obedience of both staff and public, *id.* §202.5(b) through (d); and (4) the entirety of the foregoing apparently is discoverable by the public nowhere else, and certainly not in the other potential sources to which the public would turn, the "Rules of Practice", *id.* Part 201 and the "Rules Relating to Investigations," *id.* Part 203.

The practical effect — what this publication does, not what it is labelled — is to represent a norm, finally determinative of the issues or rights to which it is addressed. It is a self-imposed limitation or narrowing of the administrative discretion and power. Though the agency may point to the factor of discretion as exempting it, that too fails to govern. The mere existence of some discretion is not sufficient, even though it is necessary, for a rule to be classified as a mere general statement of policy. *See Guardian Fed. S. &*

[9] The Court has noted a characteristic inherent in the concept of "substantive" rules: they are those that "affect substantial individual rights and obligations." *Morton v. Ruiz*, 415 U.S. 199, 232 (1974).

L. Assn. v. Federal S. & L. Ins. Corp, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

Fundamental fairness requires that the regulations be clear so that men of common intelligence need not guess at the meaning and differ as to the application, *e.g., Longview Ref. Co. v. Shore,* 554 F.2d 1006, 1014n.20 (Temp. Em. App.) *cert. denied* 434 U.S. 836 (1977). And it is imperative for the agency to narrow, clarify and explain its standards to the public "to the point of affording a fair degree of predictability of decision in the great majority of cases, and of intelligibility in all." *City of Lawrence, Mass. v. Civil Aeo. Board,* 343 F.2d 583, 587 (1st Cir. 1965) (citing Friendly, Cir. J., in *Holmes Lectures* of 1962).

E. There is considerable authority from courts that have examined agency statements issued in some form or other and professing to be only "guidelines," "usual practices," "news releases" and the like, but have found them to be substantive in their effect upon rights and obligations, and hence to be adhered to by the administrators in dealing with staff and public alike.

Much of the authority has its genesis, of course, in such as *Service v. Dulles,* 354 U.S. 363, 388 (1957): where the authority who sets the standards imposes upon itself more rigorous substantive and procedural standards than due process requires, it is bound to adhere to them. The Court applied therein what it and many courts call the *Accardi* doctrine, a principle which it had earlier set out, *supra* 354 U.S. at 372:

> namely, that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature [citing *United States ex rel Accardi v. Shaughnessy,* 347 U.S. 260 (1954)].[10]

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[10] *Compare* the two ominous acknowledgements by Justice Frankfurter, commencing his concurrence in part in *Vitarelli v. Seaton,* 359 U.S. 535, 546-47 (1959): "An executive agency must be rigorously held to the standards by which it professes its action to be judged. See *Securities & Exchange Commission v. Chenery Corp.,* 318 U.S. 80, 87-88 [1943, *opin. of* Frankfurter, J.]"; and "He that takes the procedural sword shall perish with that sword."

It was a purported "News Release" in *United States v. Heffner*, 420 F.2d 809 (4th Cir. 1969), and had been issued by the Internal Revenue Service subsequent to the time its special agents had procured incriminating statements from a tax fraud suspect without advising him of his rights to counsel. The "news release" instructed agents to advise suspects of that right and of the right to silence. Still later, the agents again interviewed the suspect, procured his signature to his prior statements without any such advice to him, and used his statements to convict him. Reversed, for failure to adhere to the obligation voluntarily placed upon itself by the I.R.S., and holding further, *id.* at 812, "Nor does it matter that these IRS instructions to Special Agents were not promulgated in something formally labelled a "Regulation" or adopted with strict regard to the Administrative Procedure Act; the *Accardi* doctrine has a broader sweep."

So also in civil and military cases: In *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir. 1959), it was the "usual practice" (because it had not been formalized in any rule) for the Federal Communications Commission to establish a cut-off date for interested persons' comments relating to a proposed action, and the court vacated the action upon detecting that several ex parte arguments had been made by interested persons to individual commissioners after the cut-off date, *id.* at 224-25. In *Smith v. Resor*, 406 F.2d 141, 145-46 (2d Cir. 1969), a Department of the Army "Weekly Bulletin" directed a unit commander to make discretionary decisions as to the length of a reservist's hair, but the commander violated its further provision, which allowed the reservist to attempt to prove that long hair contributed to his civilian livelihood, by withholding the reservist's document of such proof from the record. The sanctions against the reservist were enjoined. And in *National Labor Relations Board v. Welcome-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971), the agency's self-imposed "guideline" as to its jurisdiction over a "single employer" was enforced against it, the court holding that failure by an agency to follow its guideline tended to cause dis-

crimination and deny adequate notice contrary to fundamental concepts of fairplay and due process.

There are two conclusions to be reached from the foregoing: first, that the Commission's 17 C.F.R. §202.5(a) is more than some interpretation, description or guideline; it pronounces a voluntary standard apparently not found elsewhere, aimed at aiding the public's comprehension of the law and the regulatory agency, substantially affecting the rights of those regulated and the duties of the regulator, and qualifying the agency action to which it applies. It should be considered of such substantive effect as to be a rule enforceable against the agency. And second, where such a burden is upon the agency, the respondents have a right to the ordinary procedures of discovery, for such is necessary to prepare cross-examination or rebuttal, or both, for the evidentiary hearing at which the agency is to bear its burden. The discovery might not be for "probable cause"; but it is for "likelihood" of violation. It is not inherently dilatory. And it is provided by Rule 81(a)(3), F.R.C.P.:

> These rules apply to proceedings to compel the giving of testimony or production of documents in accordance with a subpoena issued by an officer or agency of the United States under any statute of the United States except as otherwise provided by statute or by rules of the district court or by order of the court in the proceedings.

Where, however, as in this case, the Commission disclaims the standard apparent[11] in 17 C.F.R. §202.5(a); stands upon its order, which turns tentatively only upon possibilities; asserts only relevancy and materiality of subpoenas to an investigation, and is instantly sustained by the courts

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[11] The purported standard is of a kind that courts pronounce; yet the Commission appears to have selected it deliberately. *Compare* the incident of the Commission choosing to base an action expressly upon legal decisions: the Court, holding that if such was the basis for the action, by such would the action be judged, found error in the Commission's analysis of the decisions and remanded the matter. *Securities and Exchange Comm. v. Chenery Corp., supra* note 10. The pertinence of the case to the present one seems to be confirmed by Justice Frankfurter in his restatement of its principle, years later, as quoted in note 10.

below, Writ of Certiorari is warranted to review that unique pronouncement in Section 202.5(a), and to compare the decision of the Court of Appeals to this Court's known, governing principles.

II.

An agency seeking judicial enforcement of its investigative subpoenas must be able to show not only a legitimate purpose, the relevancy of the testimony and documents summoned, and satisfaction of administrative requirements, but also that the material sought is not already within the agency's possession, pursuant to *United States v. Powell,* 379 U.S. 48 (1964) and as affirmed by another Court of Appeals, that of the Second Circuit, in 1979.

Reasons for allowance of the writ. The Court of Appeals declined to decide this question, one which raised the issue of the agency's burden in invoking judicial enforcement of its summons to produce records, thereby ruling in a way apparently in conflict with this Court's requirements pronounced in *United States v. Powell,* 379 U.S. 48 (1964). Further, in so failing, the Court of Appeals implicitly disregarded the fact that application of the *Powell* standard has been affirmed by the United States Court of Appeals for the Second Circuit, in effect a conflict of circuits.

A. The respondents contended below that the Commission should have been required to show, among the essentials to enforcement, that the material it had demanded was not already within its possession, pursuant to *United States v. Powell,* 379 U.S. 48 (1964); *accord, Commodity Futures Trading Comm. v. First Nat. Bullion Corp.,* 461 F. Supp. 659, 661 (S.D.N.Y. 1978) *aff'd without opin.* 598 F.2d 609 (2d Cir. 1979)[12]. Yet, the Tenth Circuit declined to decide the issue, upon the ground simply that the respondents had failed to identify the items they claimed were in the Commission's possession, and noting that since the Commission's order recited that no registration statement had been filed concerning the alleged investment programs, the

[12] *Cf. Securities and Exchange Comm. v. Brigadoon Scotch Dist. Co.,* 480 F.2d 1047, 1053 (2d Cir. 1973), *cert. denied* 415 U.S. 915 (1974).

Commission would not have access to documents through that source (App. A, p. 6).

The respondents, however, had no way then or later (since discovery was denied them) of knowing what the Commission possessed in the form of records, business documents, or statements, or from what sources other than a registration statement. The potential sources of documents and records range from individual persons through business directories to clerk-recorder offices, offices of secretaries of state (corporate filing records), and both state and federal revenue services. For the respondents to have been required to submit a speculative (and inevitably incomplete) list, guessing at all sources and descriptions of such, would have been impossible of fulfillment and unfair. As for the court's notation that the Commission had no registration statement and hence would not have access to documents therefrom, it (the court) displayed the erroneous conclusion that, from that, the Commission had no access at all. Such a conclusion was illogical and prejudicial; it ignored the potential separate and numerous sources referred to above, and plainly gave no regard to the position of ignorance or mere speculation thereto in which the respondents were confined.

United States v. Powell, supra, scrutinized a summons for records, which could be issued if the I.R.S. merely considered an inspection of the type described to be "necessary", 379 U.S. at 52-53. The Court, noting that analogies to other agency situations were not out of order and citing, *e.g., United States v. Morton Salt Co.* (*supra,* part I of this argument), 338 U.S. at 642-43, set out a four-element burden upon the agency in the requirements for judicial enforcement of its demands:

> [It] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps required ... have been followed....
>
> 379 U.S. at 57-58.

The first and second elements are essentially in harmony

with the three requirements for such enforcement pronounced in *Morton Salt,* 338 U.S. at 652-53. The fourth element, fulfillment of administrative steps, has been discussed in part I of this argument. The third element, requiring a showing that the information sought is not already possessed, is distinct. It should have been enforced in the present case, for *Powell* also reiterated that the respondent may challenge the summons before the court on any appropriate ground, and the moreso if the court's process may be abused, 379 U.S. at 58. The appropriate ground here was, as previously set out, the incapability of the respondents to speculate as to what sources and what documents the Commission had reached or secured, incidentally exacerbated by denial of discovery designed to mitigate that incapability.

The failure by the lower courts in this case to require such fulfillment is not saved by the mere gloss uttered by the district court in its bench findings that "facially, the agency does not have the information requested" (App. C at 3). Such had no basis to qualify as a finding of fact; and the Court of Appeals merely repeated the remark: "The trial court found the SEC showed 'facially' that it did not have the information requested." (App. A at 6). Thus there was an erroneous affirmation of an essential fact found without basis.

The Court of appeals should have heeded the third essential element of *Powell, supra,* as it was heeded in *Commodity Futures Trading Comm. v. First National Bullion, supra,* affirmed in 1979 by the Second Circuit, a case involving the Securities and Exchange Commission's brother agency, which was investigating a possible violation of the Commodity Exchange Act, and in which the district court had neither hesitancy in adhering to the directives of *Powell* nor dispute of it by the Commodity Futures Trading Commission.

Independently of the S.E.C's published Section 202.5(a), argued in part I hereof, *supra,* the failure to fulfill the requirements of *Powell* warrants issuance of Writ of Certiorari to review the apparent error of the district court and Court of Appeals.

III.

An agency seeking judicial enforcement of its investigative subpoenas may not, by its formulated recitation of "relevancy and materiality", avoid a finding of oppressiveness or unreasonable search in its demands for each and every document, including all correspondence and other writings otherwise unidentified and undescribed, which relate to the respondent personally.

Reasons for allowance of the writ. The Court of Appeals has denied relief from the district court's enforcement of agency subpoenas which contain demands in unfairly vague and overbroad language, and that denial was made in a way which allows oppressiveness and unreasonable search by the agency in conflict with applicable decisions of this Court.

A. The subpoenas duces tecum appear verbatim in the district court's Final Judgment (App. B, pp. 3-8). The Commission had originally filed its applications for enforcement (No. 79-1130, R. I, pp. 1-15; 60-66) with the subpoenas attached, and had pleaded routinely that the Commission had ordered the investigation on August 2, 1978, that the documents specified in the subpoenas were "relevant and material" to the investigation (*cf.* 15 U.S.C. §§77s(b), 78u(b), and were necessary to determine whether the purported securities were being offered, sold, and delivered in violation of securities laws, and whether respondents were engaged in a scheme to defraud purchasers, in violation of said laws.

The subpoenas include demands couched in the following language:

From petitioners Kilpatrick, Jewell, Bjerkaas, Graham, O'Donnell and Peterman (App. B, p.5), "each and every document and record relating to" — followed by the individual listing of each aforementioned petitioner (among others), so that the demand requires production of all "correspondence", "other writings of every kind and description", etc. which relate to the respondent himself or herself. That demand is notably bereft of other identification.

For example, the subpoena to Jewell requires that John Jewell is "to produce the following:...each and every docu-

ment and record relating to:...6. John Jewell...."(*ibid*).

Since the respondent would scarely risk rewriting or personally construing a subpoena, he faces a burden of production which encompasses all unprivileged matters from domestic bills and records through notification of a death in the family. It includes intimacies from priest-parishioner correspondence to love letters. The potentiality is nearly limitless. It should have struck the conscience of the court. The unbounded scope is plainly unfair; it has crossed the line of constitutional protection which separates that which is legitimately "broad" from patent unreasonableness which the courts can, and should, restrain.

B. The Fourth and Fifth (due process) Amendments of the Constitution place limitations upon the reach of agency subpoenas. The Court made that clear in *Morton Salt* and *Powell, supra,* section I of this argument, with instructions as to legitimacy of purpose and relevance, and prohibition of that which exceeds investigatory power. The Court has also taken the trouble, while speaking in a different factual context, to remind governmental regulators that both individuals and corporations have rights and that the Fourth Amendment requires that "the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome"; and though the agency has its right to conduct all reasonable inspections of such documents which are contemplated by statute, "it must delimit the confines of a search by designating the needed documents in a formal subpoena." *See v. Seattle,* 387 U.S. 541, 544 (1967). Even a grand jury with its sweeping powers may not invade a legitimate privacy interest protected by the Fourth Amendment. Its subpoena duces tecum will be disallowed if it is far too sweeping in its terms to be regarded as reasonable under the Fourth Amendment. *United States v. Calandra,* 414 U.S. 338, 346 and note 4 (1974). The gist of the constitutional protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. *Securities and Exchange Comm. v. Arthur*

Young & Co., 584 F. 2d 1018, 1024 (D.C. Cir. 1978), *cert. denied* 439 U.S. 1071 (1979), collecting principal cases. Those cases do not provide for the excuse of inartfulness, in demands as apparently incontinent as those displayed here.

Reasonableness, which is the limit on such overbreadth and oppressive scope as the present subpoenas display, warrants issuance of Writ of Certiorari to review the decision of the Court of Appeals which failed to act to impose the limits required.

CONCLUSION

From the facts and authorities herein set forth, the petitioners pray that the Court issue its Writ of Certiorari to the Court of Appeals for the Tenth Circuit for review of the entirety of its decision.

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APPENDIX A

6-9-80 79-1130 - 79-1131

United States Court of Appeals

For the Tenth Circuit

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellee,

v.

BLACKFOOT BITUMINOUS, INC. and COLFAX NATIONAL BANK,

Respondents,

STANLEY DRIZIN, WILLIAM A. KILPATRICK, JOHN JEWELL, MYRON BJERKAAS, FRANCES GRAHAM, DECLAN J. O'DONNELL and RICHARD PETERMAN,

Respondents-Appellants.

No. 79-1130

SECURITIES AND EXCHANGE COMMISSION,

Applicant-Appellee,

v.

P & J COAL COMPANY, INC. and JOHN H. PETTINGILL,

Respondents-Appellants.

BLACKFOOT BITUMINOUS, INC., and P & J COAL COMPANY, INC.,

Plaintiffs-Appellants,

v.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION,

Defendant-Appellee.

No. 79-1131

FILED
United States Court of Appeals
Tenth Circuit
Jun 9 1980
HOWARD K. PHILLIPS
Clerk

Appeals from the United States District Court
For the District of Colorado
(Civ. Nos. 78-F-1149, 78-F-1247 and 79-F-56)

Robert C. Ripple of O'Donnell, Beville & Ripple, Denver, Colorado, for Appellants.

Michael K. Wolensky, Assistant General Counsel (Jacob H. Stillman, Associate General Counsel and Jonathan Eisenberg, Attorney, on the brief), Securities and Exchange Commission, Washington, D.C., for Appellee.

Before McWILLIAMS, BREITENSTEIN and LOGAN, Circuit Judges.

LOGAN, Circuit Judge.

These are appeals from district court orders enforcing two Securities and Exchange Commission (SEC) subpoenas and dismissing an action for declaratory relief. Appellants contend the subpoenas are invalid and enforcement should have been denied for various reasons. Those we believe warranting discussion are the contentions that (1) the SEC is required by 17 C.F.R. § 202.5(a) to establish on the record a "likelihood of violation," which it failed to do; (2) the SEC failed to make the showing required by United States v. Powell, 379 U.S. 48 (1964), and (3) the subpoenas were overbroad and burdensome. Also, we treat briefly appellants' argument that it was error for the court to deny them pre-enforcement discovery of certain documents from the SEC.

The SEC issued an order instituting a nonpublic formal investigation into the activities of Blackfoot Bituminous, Inc., P & J Coal Company, Stanley Drizin and John H. Pettingill relating to their offer and sale to the public of investments in coal lease tax shelter programs. Immediately thereafter the SEC issued subpoenas duces tecum to all respondents except Blackfoot Bituminous, Inc. The subpoenas required production of certain corporate records of Blackfoot Bituminous and any other entity engaged in the production of coal lease programs. After refusal by all respondents to comply with the subpoenas, the SEC applied for judicial enforcement under 15 U.S.C. §§ 77v(b) and 78u(c). Shortly thereafter the corporate respondents commenced an action against the SEC in which they sought a declaratory judgment that the subpoenas were legally invalid. Although the district court denied a motion to consolidate, it heard and decided the enforcement and declaratory judgment actions at the same time.

The SEC alleged in its enforcement applications that the requested documents were "relevant and material" to its investigation. In support, it provided the district court with the order commencing the investigation. This order set out the factual basis for the Commission's action. Respondents answered with a general denial that the subpoenas were enforceable, raising the issues pressed in this appeal and discussed below and other defenses not germane to the issue of enforceability.

I

To obtain judicial enforcement of an administrative subpoena, an agency must show that the inquiry is not too indefinite, is reasonably relevant to an investigation which the agency has authority to conduct, and all administrative prerequisites have been met. United States v. Morton Salt Co., 338 U.S. 632 (1950). In the context of a subpoena issued by the SEC, a determination that "a subpoena [is] within the scope of the authority granted... is enough to authorize subpoenas for the production of records which might reveal the existence and extent" of any violation of the securities

law. Securities and Exch. Comm'n v. First Security Bank, 447 F.2d 166, 168-69 (10th Cir. 1971), cert. denied, 404 U.S. 1038 (1972).

On the basis of the SEC order directing a formal investigation the trial court found the subpoenas met the requirements set forth above and ordered the production of the subpoenaed documents by all respondents except Blackfoot Bituminous, Inc., which it found had never been served. We agree with the district court's holding that the necessary showings for judicial enforcement were met in this case. The SEC has authority to "make such investigations as it deems necessary to determine whether any party has violated, is violating, or is about to violate" the securities laws it is entrusted to uphold. 15 U.S.C. § 78u(a). See also 15 U.S.C. § 77t(a). Pursuant to this broad grant of authority, the Commission is empowered to "require the production of any...records which [it] deems relevant or material to the inquiry." 15 U.S.C. § 78u(b). See also 15 U.S.C. § 77s(b). A Commission order of investigation is the only administrative requirement for the commencement of formal investigative proceedings. 17 C.F.R. § 203.1 et seq. (1979).

A.

Appellants' major argument is that the SEC failed to establish a case for judicial enforcement because 17 C.F.R. § 202.5(a) requires the agency to establish on the record a "likelihood of violation" of the securities laws before administrative process can be judicially enforced.[1] The trial court refused to look behind the Commission's order, holding that 17 C.F.R. § 202.5(a) is not a rule but merely a description of the Commission's internal operating procedure.

Respondents contend that the reference to a preliminary finding of a "likelihood" of a violation places upon the SEC the burden of proving a factual basis for its decision to institute a formal investigation as a prerequisite to enforcement of its subpoenas. We do not agree.

---

[1] 17 C.F.R. § 202.5(a) (1979) provides, in part, [cont'd.]

First, that reference appears to be descriptive only. Although it appears in the Code of Federal Regulations, it is in one of several sections denominated "brief description[s] of procedures generally followed by the Commission which have not been formalized in rules." 17 C.F.R. § 202.1(c) (1979) (emphasis added). Second, assuming without deciding that the description of the procedure should be treated as a rule, we do not equate likelihood of violation referred to in this provision with probable cause. At this initial stage, before any adverse action has been taken against respondents, or indeed before any specific documents have been identified as relevant, it is unnecessary and contrary to judicial precedent to require more than the safeguards mandated by Morton Salt and the United States v. Powell, 379 U.S. 48 (1964). Powell rejected a taxpayer's claim that the Internal Revenue Service must indicate the grounds for its belief that a fraud had been committed before enforcement of a summons could be ordered. The Court ruled "the government need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process...." 379 U.S. at 51. More than mere allegations of abuse are necessary to raise a substantial question. See United States v. LaSalle Nat'l Bank, 437 U.S. 298 (1978). We do not believe the SEC, in describing its procedures in 17 C.F.R. § 202.5(a), intended to assume a greater burden than the Supreme Court decisions require, and we will not so hold.

> Where .... it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made... When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission, which may then order a formal investigation or examination if it is deemed necessary.
>
> (Emphasis added).

B.

Respondents also contend that Powell imposes on the SEC an additional requirement not met in this case. In Powell the Supreme Court required the Internal Revenue Service to show that it did not possess the information it sought by subpoena before enforcement of the subpoena would be granted. We need not and do not decide whether this requirement applies in the instant case.

The trial court found the SEC showed "facially" that it did not have the information requested. The respondents failed to identify specifically the items they claim were in the Commission's possession. In support of this finding, we note that the Commission order recited that no registration statement had been filed concerning the lease investment programs, and therefore the SEC would not have access to documents through this source.

C.

Respondents also contend the subpoenas are unenforceable because the SEC is on a "fishing expedition," issuing burdensome, excessively broad subpoenas that request irrelevant items. The district court properly resolved these questions against respondents, finding respondents' unsupported allegations did not rise to the level of proving a defense to enforcement of the subpoenas. The burden of showing abuse is upon respondents. The court noted, "neither Respondents nor Councel have endeavored to work with the staff of the Commission to discuss the oppressive demands." "Before the courts will hold an order seeking information reports to be arbitrarily excessive, they may expect the supplicant to have made reasonable efforts before the Commission itself to obtain reasonable conditions." United States v. Morton Salt Co., 338 U.S. 632, 653 (1950).

II

We need not consider respondents' contention that the

trial court erred in denying their motion to compel discovery of "[t]he documents considered by any commission prior to or relative to the issuance of the Order of Private Investigation." Respondents' allegedly sought discovery for the purpose of determining whether the Commission complied with 17 C.F.R. § 202.5(a). However, they concede in their reply brief that the trial court did not err if we determine, as we have, that section 202.5(a) does not require the Commission to show the likelihood of a violation. We therefore do not reach the issue.

We have reviewed all additional arguments tendered by appellants and find them lacking in merit. The orders of the district court enforcing SEC's subpoenas are affirmed. Respondents' declaratory judgment action, based upon the same contentions asserted in the subpoena proceedings, was properly dismissed for failure to state a cause of action.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLORADO

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

v.

BLACKFOOT BITUMINOUS, INC.,
STANLEY DRIZIN,
WILLIAM A. KILPATRICK,
JOHN JEWELL,
MYRON BJERKAAS,
FRANCES GRAHAM,
DECLAN J. O'DONNELL,
RICHARD PETERMAN, and
COLFAX NATIONAL BANK,

Respondents.

CIVIL ACTION
NO. 78-F-1149

FINAL JUDGMENT

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

v.

P & J COAL COMPANY, INC., and
JOHN H. PETTINGILL,

Respondents.

CIVIL ACTION
NO. 78-F-1247

FINAL JUDGMENT

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 29 1979

JAMES R. MANSPEAKER
CLERK

The above-entitled matters coming on to be heard on January 26, 1979 pursuant to due notice; and Messrs. Amy

and Krys appearing on behalf of Applicant, Securities and Exchange Commission; and Mr. Blum appearing on behalf of Respondent Colfax National Bank; and Messrs. Ripple and Treece appearing on behalf of all other Respondents; and counsel for the parties agreeing that the motions, evidence and arguments submitted shall be considered as applicable to each of the above-entitled matters inasmuch as the Securities and Exchange Commission, Applicant in both actions, is seeking to enforce subpoenas issued pursuant to the same order of investigation and the defenses in the two actions are essentially the same; and upon consideration of the papers filed herein, the evidence received and the arguments of counsel for all the parties; and the Court having orally announced its findings and conclusions this date in open Court which the parties have ordered transcribed; and said transcript shall serve as the written findings and conclusions, which in summary are: the Court has jurisdiction of the parties and the subject matters pursuant to the Securities Exchange Act of 1934, as amended, and the Securities Act of 1933, as amended; the Securities and Exchange Commission, Applicant herein, is conducting a lawful investigation pursuant to the aforesaid Acts; and on August 2, 1978 has adopted an Order Directing A Private Investigation; and designated members of its staff as officers authorized to issue subpoenas; officers, so designated, have issued subpoenas to the Respondents; the Respondents have failed to comply; there are proper grounds for compliance by the Respondents to the subpoenas issued by the Securities and Exchange Commission; the information required by the subpoenas is essential for governmental purposes; there has been no showing made to the satisfaction of the Court that there is anything other than a lawful purpose for the issuance of the subpoena by the Securities and Exchange Commission; the subpoenas issued by the Securities and Exchange Commission in connection with this matter are not oppressive, overly broad or excessive; the documents required by the subpoenas are relevant and material to an investigation by the Commission pursuant to its power and authority; the subpoenas as issued should be

enforced except that the subpoena issued to Respondent Stanley Drizin was issued to him individually and not as President or an officer of Blackfoot Bituminous, Inc.; and no subpoena, as such, was properly served on Blackfoot Bituminous, Inc.; the action should be dismissed without prejudice as to Blackfoot Bituminous, Inc.; and the order with respect to Respondent Stanley Drizin should require him to produce only his personal records that relate to the several organizations specified in the subpoena and not the records of Blackfoot Bituminous, Inc. that he may hold or control in a representative capacity, without prejudice to the Applicant's right to serve a new subpoena on him in a representative capacity requiring him to produce books and records of Blackfoot Bituminous, Inc. that he may hold in a representative capacity;

IT IS HEREBY ORDERED as follows:

Each of the Respondents, Stanley Drizin, William A. Kilpatrick, John Jewell, Myron Bjerkaas, Frances Graham, Declan J. O'Donnell, Richard Peterman, P & J Coal Company, Inc., John H. Pettingill, and Colfax National Bank, through a representative, shall comply with the respective subpoenas and appear before Thomas J. Amy, or some other officer designated by the Securities and Exchange Commission, at the Denver Regional Office of the Securities and Exchange Commission, Room 640, Two Park Central, Denver, Colorado 80202, at a time to be mutually agreed upon by the parties, but in no event before March 1, 1979 and no later than March 15, 1979, and shall testify and produce the books, records and documents in their respective possession or under their respective control as follows:

Respondents P & J Coal Company, Inc. and John H. Pettingill are to produce the following:

For the period from January 1, 1977 to date, each and every of the following records and documents in the possession or under the control of P & J Coal Company, Inc. and/or John H. Pettingill relating to P & J Coal Company, Inc., its affiliates and subsidiaries, and to Blackfoot Bituminous, Inc., Cheyenne Coke and Coal Co., Inc., their respective affiliates and subsidiaries and/or any

other entity engaged in the promotion of coal lease programs and/or tax shelter investments.

(a) The articles of incorporation or articles of limited partnership.

(b) Stock transfer records, stockholder ledgers, stock certificate books, shareholder lists, limited partners lists, and each and every other record identifying an investor or investors.

(c) Offering circulars, prospectuses, sales literature, advertisements, press releases, photographs, photographic slides, tape recordings and transcripts of meetings.

(d) Tax opinions.

(e) Incoming correspondence and copies of outgoing correspondence.

(f) Memoranda.

(g) Documents setting forth the names and addresses of persons attending meetings, including, but not limited to, "sign-in" sheets, lists, cards, and minutes of meetings.

(h) Minutes of meetings, corporate and other.

(i) Books and records, financial statements, tax returns (filed or prepared to be filed with any governmental entity), bank records, including, but not limited to, bank statements, cancelled checks, check stubs, credit and debit memoranda, deposit and withdrawal slips, loan records, including but not limited to, loan or financing agreements and records of payment.

(j) Documents concerning or evidencing any property rights.

(k) Reports.

(l) Leases, contracts and agreements (and preliminary drafts thereof).

(m) Records which set forth the names and addresses of all salesmen and/or compensation paid thereto.

(n) Orders issued by any court or governmental authority.

(o) Applications for permits and permits to mine coal on any property.

(p) Notes (handwritten or typed).

Respondents William A. Kilpatrick, John Jewell, Myron Bjerkaas, Frances Graham, Declan J. O'Donnell and Richard Peterman are to produce the following:

For the period from January 1, 1977 to date, to produce each and every document and record relating to:

1. Blackfoot Bituminous, Inc., and its affiliates and subsidiaries.
2. Cheyenne Coke and Coal Company, Inc., and its affiliates and subsidiaries.
3. Any other entity similarly engaged in the promotion of coal lease programs and/or similar tax shelter investment programs.
4. Stanley Drizin.
5. William A. Kilpatrick.
6. John Jewell.
7. Declan J. O'Donnell.
8. Harold Warden and/or Harold Warren.
9. P & J Coal Company, Inc., its affiliates and subsidiaries, including but not limited to P & J Coal Company, Inc., a Pennsylvania corporation.
10. John H. Pettingill.
11. Myron Bjerkaas,
12. Frances Graham.
13. Richard Peterman.
14. Barbara L. Francis.

Such documents and records to include, but not be limited to, correspondence, agreements, contracts, memoranda, notes, notes of telephone conversations, notes of meetings of directors, telegrams, lists, lists of corporations and of their shareholders and officers and directors, cancelled checks, bank records (including but not limited to drafts, statements, deposit slips and advises of debit or credit), reports, sales literature (offering circulars, prospectuses, sales brochures, and other promotional material), and other writings of every kind and description (whether or not actually used.)

Respondent Colfax National Bank, through its authorized representative, is to produce:

All bank records relating to accounts in the following

names: Arapahoe Coal or Arapahoe Coke and Coal; Blackfoot Bituminous, Inc.; Cheyenne Coke and Coal or Cheyenne Coal; Dakota Coke and Coal or Dakota Coal; Erie Coke and Coal or Erie Coal; One Ton Coal Co.; Two Ton Coal Co.; Three Ton Coal Co.; Four Ton Coal Co.; Five Ton Coal Co.; Six Ton Coal Co.; Seven Ton Coal Co.; Eight Ton Coal Co.; Nine Ton Coal Co.; One Miner Coal Co.; Two Miners Coal Co.; Three Miners Coal Co.; Four Miners Coal Co.; Five Miners Coal Co.; Six Miners Coal Co.; Seven Miners Coal Co.; Eight Miners Coal Co.; Nine Miners Coal Co.; and P & J Coal Company; or accounts having any of the following persons as signatories: Stanley Drizin, William A. Kilpatrick, Declan O'Donnell, John Jewell, John H. Pettingill, Myron Bjerkaas, Ms. Frances Graham, and Richard Peterman, including but not limited to the following from the inception of the account to date:

1. Signature cards, corporate resolutions, correspondence, inter-bank memos.

2. Loan agreements and other evidences of indebtedness, loan files and ledgers including financial statements, collateral or other documents related to security, loan applications, credit files, loan account, notice of collection, notice of demand.

3. Deposit slips, deposited items, credit memos, wire transfers.

4. Debit memos, bank statements, cancelled checks, cashier checks, wire transfers, bank charges, inter-bank charges, drafts, sight drafts.

5. Escrow accounts, escrow agreements, certificates of deposit, savings accounts.

6. Transfer records.

Respondent Stanley Drizin is to produce the following, except that notwithstanding any provision of this order to the contrary, he is not required to produce any books, records or documents of Blackfoot Bituminous, Inc. that he may have or control in a representative capacity of Blackfoot Bituminous, Inc. or its affiliates or subsidiaries, relating to Blackfoot Bituminous, Inc., Cheyenne Coke and

Coal and their respective affiliates and subsidiaries:

For the period from January 1, 1977 to date, the following records and documents in the possession or under the control of Stanley Drizin relating to Blackfoot Bituminous, Inc., Cheyenne Coke and Coal Co., Inc., their respective affiliates and subsidiaries and/or any other entity engaged in the promotion of coal lease programs and/or tax shelter investments and to P & J Coal Company, Inc., its affiliates and subsidiaries.

(a) The articles of incorporation or articles of limited partnership.

(b) Stock transfer records, stockholder ledgers, stock certificate books, shareholder lists, limited partners lists, and each and every other record identifying an investor or investors.

(c) Offering circulars, prospectuses, sales literature, advertisements, press releases, photographs, photographic slides, tape recordings and transcripts of meetings.

(d) Tax opinions.

(e) Incoming correspondence and copies of outgoing correspondence.

(f) Memoranda.

(g) Documents setting forth the names and addresses of persons attending meetings, including, but not limited to, "sign-in" sheets, lists, cards, and minutes of meetings.

(h) Minutes of meetings, corporate and other.

(i) Books and records, financial statements, tax returns (filed or prepared to be filed with any governmental entity), bank records, including, but not limited to, bank statements, cancelled checks, check stubs, credit and debit memoranda, deposit and withdrawal slips, loan records, including but not limited to, loan or financing agreements and records of payment.

(j) Documents concerning or evidencing any property rights.

(k) Reports.

(l) Leases, contracts and agreements (and preliminary drafts thereof).

(m) Records which set forth the names and addresses of all salesmen and/or compensation paid thereto.

(n) Orders issued by any court or governmental authority.

(o) Applications for permits and permits to mine coal on any property.

(p) Notes (handwritten or typed).

IT IS FURTHER ORDERED that: (a) the Motions to Dismiss of Respondents Stanley Drizin and Richard Peterman are hereby denied; (b) the action as to Respondent Blackfoot Bituminous, Inc. is dismissed without prejudice; (c) without further order of this Court, the Applicant, Securities and Exchange Commission, shall not disclose any of the documents or information obtained as a result of this Order to any other governmental agency; (d) the Motions of the Respondents for a stay of this Order beyond March 1, 1979 are hereby denied, the March 1, 1979 date was selected to enable the Respondents, if they choose, to appeal and to afford them ample time to apply for a stay or stays to the Court of Appeals; and (e) no costs are awarded in this action; however, the Respondents, after complying with this Order, may apply to this Court for the expenses incurred in complying with the Order to the extent that such expenses are over and above those reasonably and normally incurred as part of their business.

IT IS FURTHER ORDERED that the Respondent Colfax National Bank is specifically not prevented from seeking post-trial relief for costs that it incurs in complying; and that the Applicant and Respondent Colfax National Bank shall cooperate with a view to minimizing the costs to be incurred by the Respondent Colfax National Bank in complying, such as utilizing Applicant's personnel and its copying equipment, if compatible with the format in which the records are kept.

Dated this 29th day of January, 1979.

BY THE COURT,

/S/

Sherman G. Finesilver, Judge
United States District Court
District of Colorado

UNITED STATES DISTRICT COURT

FOR THE

DISTRICT OF COLORADO

CIVIL ACTION NO. 79-F-56

BLACKFOOT BITUMINOUS, INC. and
P & J COAL COMPANY, INC.,
Plaintiffs,

v. FINAL JUDGMENT

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION,
Defendant.

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

JAN 29 1979

JAMES R. MANSPEAKER
CLERK

The Court this day having heard and having rendered final judgments in two actions which were brought in this court; to wit, *Securities and Exchange Commission,* Applicant, v. *Blackfoot Bituminous, Inc., et al.,* Respondents, Civil Action No. 78-F-1149, and *Securities and Exchange Commission,* Applicant, v. *P & J Coal Company, Inc. et al.,* Civil Action No. 78-1247, and attorneys for the Securities and Exchange Commission in those actions, Messrs. Krys and Amy, being present, and attorneys for the Respondents in those actions, James L. Treece and Robert C. Ripple, being attorneys for the Plaintiff in this action having moved to consolidate this action with the aforedescribed actions, and having represented to this Court immediately after the Court announced its decisions in those actions this 26th day of January, 1979, that the issues, evidence and arguments made in those actions are the same as those that would be offered and made in this action, and that those decisions operate as *res judicata* and collateral estoppel in this action and require a judgment in this action which is harmonious and consistent with the judgments rendered in those actions and that therefore such judgment would be adverse to the Plaintiffs and in favor of the Defendent:

IT IS THEREFORE ORDERED that: the motion to consolidate is denied, the Plaintiffs in this action are not entitled to any relief whatsover (except quashing of the subpoena as it relates to Blackfoot Bituminous Inc. See Order and Judgment this date in Civil Action No. 78-F-1149). Therefore, the Court denied all other relief which they sought, and judgment in this action is rendered in favor of the Defendant, the Securities and Exchange Commission.

IT IS FURTHER ORDERED that the parties are to bear their own costs.

Dated this 29th day of January, 1979.

/S/

Sherman G. Finesilver
Judge, United States District Court

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

SECURITIES AND EXCHANGE COMMISSION,

Applicant,

vs.

BLACKFOOT BITUMINOUS, INC.,
STANLEY DRIZIN,
WILLIAM A. KILPATRICK,
JOHN JEWELL,
MYRON BJERKAAS,
FRANCES GRAHAM,
DECLAN J. O'DONNELL
RICHARD PETERMAN and
COLFAX NATIONAL BANK,
Respondents.

Civil Action No.
78-F-1149

REPORTER'S
TRANSCRIPT

JUDGE'S RULING

SECURITIES AND EXCHANGE COMMISSION,
Applicant,

vs.

Civil Action No.
78-F-1247

P & J COAL COMPANY, INC., and
JOHN H. PETTINGILL,

Respondents.

Proceedings before the HONORABLE SHERMAN G. FINESILVER, U.S. District Judge, United States District Court for the District of Colorado, beginning at 10:20 o'clock a.m., on the 26th day of January, 1979, in Courtroom 203, United States Courthouse, Denver, Colorado.

APPEARANCES

JOSEPH F. KRYS and THOMAS J. AMY, 1515 Arapahoe, #640, Building 2, Denver, Colorado, appearing on behalf of the Securities and Exchange Commission.

JAMES TREECE and ROBERT RIPPLE, 2596 West Alamo Avenue, Littleton, Colorado, appearing on behalf of Respondent Blackfoot Bituminous, Inc.

GARY B. BLUM, Attorney at Law, 15th Floor, Energy Center One Building, 717—17th Street, Denver, Colorado, appearing on behalf of Respondent Colfax National Bank.

PROCEEDINGS

* * * * * * * * * * *

THE COURT: The record should reflect the Court has reviewed the briefs filed in this action and considered the applications of Securities and Exchange Commission for an order requiring subpoenas to be issued in Cases 78-F-1247 and 78-F-1149. We have considered the briefs, the recitals of Plaintiff's Exhibit 1, the arguments of Counsel for both parties and for the Colfax Bank, and being advised on the premises, we enter the following findings and order: One, the Court has jurisdiction of the parties and the subject matter pursuant to Section 22b of the Securities Act of 1933 as amended, 15 United States Code, 77v(b) and Section 21c of the Securities Exchange Act as amended, 17 United States Code, Section 78u(c).

We find further that there are proper grounds for compliance by the Respondents with the subpoenas issued by the Securities and Exchange Commission.

Three, the Respondents, with the exception of Blackfoot Bituminous Coal Company, should comply with the subpoenas for the information required by the subpoena of the Securities and Exchange Commission. It is essential for Governmental purposes.

We find further that there has been no showing made to the satisfaction of the Court that there is anything other than a lawful purpose for the issuance of the subpoenas by

the Securities and Exchange Commission, the applicant. Further, that the subpoenas issued by the Securities and Exchange Commission in connection with this matter is not oppressive, overly broad or excessive, and subpoenas will not be quashed with the exception of Blackfoot Bituminous.

We will allude to Blackfoot in a minute. The matter as to compliance with the subpoena in question has been pending with the Securities and Exchange Commission since approximately August 2nd, 1978.

Further, that the documents required by the subpoenas are relevant and material to an investigation by the Securities and Exchange Commission pursuant to its power and authority.

We further find that the purposes set forth in the subpoena are legitimate in nature. The inquiry is relevant for the purposes of the investigation as set forth in Plaintiff's Exhibit 1.

The agency—facially, the agency does not have the information requested, and we find, with the exception of Blackfoot Bituminous, that the requisite procedures have been followed.

We initially would care to call to Counsel's attention, as has been alluded to in argument, the case of *United States vs. Morton Salt Company,* found at 338 U.S. 632, 1950.

In that case the Supreme Court compared an agency inquiry to that of a Grand Jury which can investigate merely a suspicion that a law has been violated without the necessity of probable cause.

The Supreme Court states in part, quoting, "Even if one were to regard the request for information it's caused by nothing more than official curiosity, nevertheless law enforcement agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest," unquote.

Further would commend to Counsel the one case of *Federal Trade Commission vs. Texaco,* found at 555 Fed. 2d, 862. The case from the D.C. Circuit in 1977 wherein it is stated, quoting, "The better approach is simply to recognize that in the pre-complaint stage, an investigating agency is

under no obligation to propound a narrowly focused theory of a possible future case.

"Accordingly, the relevance of the agency subpoena request may be measured against the general purpose of its investigation. The District Court is not free to speculate about the possible charges that might be included in future complaint, than to determine the relevance of the subpoena request by reference to those hypothetical charges.

"The Court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, that the complaint may not and need not ever issue," unquote.

We have studied the recitals in Plaintiff's Exhibit—or Applicant's Exhibit 1 designated "Order Directing Private Investigation," and designating officers to take testimony.

And it starts with the prefatory language that the Commission's public official files disclose that no registration statement has been filed or is in effect with the Commission under the Securities Act of '33 as amended concerning any securities of Blackfoot Bituminous, Incorporated a Nevada corporation, or any coal lease investment programs promoted by Blackfoot Bituminous.

It then goes on to state under Roman Numeral II that, "Members of its staff are reporting information to the Commission which tend to show, A, that Blackfoot and P & J Coal and its subsidiary, and Mr. Drizin, Pettingill and others have been and are offering to sell to members of the public certain securities, namely interests in coal mining properties in the form of sub-leases, and further that while engaged in the offering sale of such securities the persons made to purchasers, prospective purchasers, untrue statements of material facts and omitted to state material facts necessary to make the statements made in light of the circumstances under which they were made not misleading concerning, among other things," and thereafter I listed ten items that are the subject of the investigation and the inquiry.

We are satisfied that specificity has somewhat been set out in the order directing the private investigation and de-

signating the officers to take testimony. We further find as follows: That on August 2nd, 1978, the Applicant issued an order directing private investigation be made in a matter of the entities I have mentioned and the three individuals, and that the private investigation order was issued pursuant to 15 United States Code, Section 77f and 78u by the order of the Commission to direct an investigation to be made to determine, among other things, whether in the offer and sale of certain securities, to-wit investments and coal lease tax shelter programs, any persons who have engaged, or about to engage in violation of the Federal Securities laws, specifically the registration and antifraud provisions thereof.

Pursuant to the authority vested in the designated officer by order of private inquiry, subpoenas duces tecum were issued to individuals, and these subpoenas directed Respondents to appear before the investigating officers to answer questions and to produce any books, papers, correspondence, memoranda or records relevant and material to the inquiry.

Except as noted, all of the following reside in Colorado were served in Colorado by certified mail, and call for compliance at SEC offices in Denver: Mr. Pettingill, President, P & J Coal. This is set forth in 78-F-1247. P & J coal, care of Declan J. O'Donnell. Further, Stanley Drizin lives in Las Vegas, Nevada, and his subpoena—the compliance was personally served, required compliance as mentioned, was the United States Attorney's Office in Las Vegas.

William A. Kilpatrick, John Jewell, Myron B-j-e-r-k-a-a-s, Frances Graham, Declan J. O'Donnell, Richard Peterman, Grampian, Pennsylvania, and the Colfax National Bank.

The Respondents have answered the complaint, the Motion to Compel. They filed an answer in 78-F-1149, but they have requested that this applies to both cases. The Court will accede to that request.

The SEC responded to the answer in both cases.

The agency rule compliance I would care to discuss. The

Defendents want to know which Commissioners voted, and how for the investigation by the Commission, what the tally was and other information. We deny that request.

The Commission is a fact-finding body performing an investigatory function similar to that of a Grand Jury as set forth in the *Morton Salt* case.

Just as the Court will not go behind an indictment to inquire as to the basis of the Grand Jury after returning the indictment, the Court will not go behind the formal order of investigation in a subpoena enforcement proceeding, *Costello vs. United States,* 350 U.S. 359, 1965, *SEC vs. First Security Bank of Utah,* 447 Federal 2d 166, a Tenth Circuit case, 1971, certiorari denied.

As to the substantive requirements, the Defendants have alleged that the Commission has failed to comply with 17 CFR 202.5a, which deals with the issue of investigation order, preliminary methods and "the likelihood" of violation.

We reject this request and find no merit in Respondent's position. First, 17 CFR, Section 202 deals with informational and other procedures. It's not the rules of practice of the SEC. These are contained in 17 CFR, Section 201.

As we view it, 202.5 is not a formal rule, but a description of the informal investigation, the investigation procedures used by the Applicant.

Second, it appears that the Respondents are comparing "likelihood" to a probable cause standard, an approach that was rejected in the *Morton Salt* case. We do not read the investigative duty of the SEC to ensure that the securities laws are not being violated require that this SEC have probable cause to investigate.

In any event, we find that the SEC's knowledge of the lack of registration by the involved companies fulfills the requirement of likelihood of violation of potential—or potential violation of the securities laws.

Counsel for the Respondents or the Defendents, as the case might be, have contended that the Government is on a fishing expedition as the subpoena request is not specific enough. They question the relevance on many of the documents. They argue the burdensomeness of the request and

realize that the SEC already has many of the documents in its possession.

We reject this contention of the Defendants under the *Morton Salt* case. The criteria may be listed as follows: "One, the information sought must be reasonable relevant and not plainly irrelevant or immaterial to an authorized and lawful inquiry of the Applicant.

"Second, the demand for production must not be too indefinite nor encompass material that is privileged or otherwise exempt from disclosure, and, three, compliance with the subpoenas must not be unreasonable or unduly burdensome."

We find that the Applicant in its response to that contention establishes the relevance of the documents requested by the subpoenas, and the relevance that has been alluded to is not the relevance that is even set forth in Article 401 of the Federal Rules of Evidence. Arguendo, we are satisfied under that statute of relevance that relevance has been established.

Where we find that degree of relevance in the investigatory proceeding is not necessary, arguendo, we find that it has been satisfied. We find that the subpoena is sufficiently specific in the documents and materials that it demands. If there is a difference of opinion once the conference goes forward, before the Commission or before the investigating officer, other relief is available to the Defendants in regard to an effort to work out any differences or ambiguities as to what the subpoena requests.

As to burdensome, we find the Respondent's claims that the subpoena will require them to sort through all their records to be without merit. Such is the duty in lawful subpoena compliance. As to the argument of the SEC already has some of the documents in its possession, the production of them by Respondents is necessary in order to authenticate the documents.

It may or may not be the ones that have been filed with the official agencies. Also, any notes on the documents might be useful.

We note that the burden of showing unreasonableness of

the subpoena is on the subpoenaed party. This is a burden not easily met. As set forth in the *Federal Trade Commission* case that the Court has alluded to, and the case where certiorari was denied.

We also call Counsel's attention in this regard to the case of *SEC vs. Brigadoon Scotch Distributing Company,* 480 Federal 2d 1049, a 1973 Second Circuit case.

In addition, the Respondents allege administrative and investigative harassment. However, neither Respondents nor Counsel have endeavored to work with the staff of the Commission to discuss the oppressive demands.

Facially we cannot find that they are oppressive or harassing. No effort has been made to work out any purported differences with the Applicant, or to make any arrangements to have the documents produced at a different location.

Before we hold a subpoena to be unreasonable, we expect the objecting party to make an effort to obtain reasonable conditions, and to work out their differences, a procedure that is underscored in the *Morton Salt* case.

As noted, Respondents have done nothing more than inform the Applicant that they will not comply with the subpoenas.

Going further into the Fifth Amendment and the attorney-client privilege, the Defendants have alleged that the Fifth Amendment and attorney-client privilege exists in many of the documents. At this time we deny this defense.

We begin by the observation that the application agrees with Respondents that privileged documents cannot be ordered produced. However, as we view it, the objection at this time is premature.

The Applicant is entitled to have the Respondents appear and to enter their claims of privilege on the record as to the exact documents or line of inquiry that is pursued.

In this manner only can the Applicant evaluate the legitimacy of such claims, the action it wishes to seek. That is by Court enforcement, immunity and other avenues of relief.

Additionally, we note that not all of the documents requested can be guarded or insulated by the attorney-client privilege or the Fifth Amendment right against self-incrimination.

For example, the officers of the corporation or a corporation have no Fifth Amendment interest in the records of the corporation. Accordingly, Respondents must appear and testify and make any claims of privilege on the record.

Going further to P & J Coal and Pettingill's business activities, the allegations by the Respondents that they are not within the authority of the Commission to investigate, the Defendants have the responses asserted that the P & J buys up coal leases, and pays so much per ton, but they mine coal for leaseholders and charge costs of production plus fifty cents per ton. They claim that this can in no way be claimed to be a security.

We need not decide that question now. Even though we recognize that a security has gone through a meandering course of judicial proceedings in recent years. However, at this time the contention of the Respondents is denied.

This activity may have involved violation of securities registration requirements or antifraud provisions. Subleases in coal prospectives could be investment contracts. The Commission's authorized to investigate possible violations. They have set forth in Plaintiff or Applicant's Exhibit 1 those areas, thus we feel the dispute is a fishing expedition categorization made by the Respondents.

Furthermore, the Commission can investigate in order to determine if it does indeed have authority and jurisdiction over such activities as set forth in the *SEC* case *vs. Brigadoon Scotch,* the citation of which the Court has already given.

Moving forward to the Motion to Dismiss filed by Drizin, Blackfoot Bituminous and Peterman, as to Drizin and Peterman, we deny the Motion to Dismiss. Drizin was personally served in Las Vegas to appear at the United States Attorney's Office there.

Mr. Peterman was served by mail in Pennsylvania to appear at the Commission offices in Denver. These Respondents claim that neither the '33 Act nor the '34 Act give the

Court personal jurisdiction over them to enforce the subpoena, and the service of the subpoenas is improper.

We are satisfied that a clear reading of 15 United States Code, Section 78u destroys the contentions or arguments made by Mr. Drizin and Mr. Peterman.

78u(b) allows the Commission to subpoena witnesses and compel production from any place in the United States, or any state at any designated place.

78u(c) in regard to judicial enforcement of subpoenas sets forth that the Commission may invoke the aid of any Court of the United States within the jurisdiction in which such investigation or proceeding is carried on.

Further, that all process in any such case may be served in the judicial district wherein such person is inhabitant, or wherever he may be found. Thus, as we view it, the '34 Act gives the Commission and the Court jurisdiction over these parties, and the '33 Act argument is not notorious under our view.

The serious argument has been submitted in regard to the legitimacy or the legal sufficiency of service of process on Blackfoot. In our view, Blackfoot Bituminous was not properly served. Mr. Drizin is the President of Blackfoot, according to the SEC. At one point in the pleadings it appears that he denied he was the President. However, in Counsel's argument today he admits that he was or is a President.

However, the subpoena to Drizin is addressed to "Stanley Drizin." And the attachment which lists the document he is to bring says, "His documents or the documents of Blackfoot Bituminous," This is improper service on Blackfoot. Drizin was served as an individual.

On the service of process facially it did not indicate his official capacity with Blackfoot. Blackfoot should have been served in a way prescribed by the Rules of Civil Procedure, or, in any event, in some terminology similar to Stanley Drizin as President, or something of like import to effectuate proper service, or service of process on an agent for Bituminous, if this is the fact in Colorado.

We are not suggesting or advising the proper way of

serving the service of process on Blackfoot. We are merely giving illustrations. However, we hold that Blackfoot was not properly served, thus the subpoena should not be enforced against Blackfoot.

But Mr. Drizin must produce any documents of Blackfoot that he has in his individual capacity rather than in his official capacity, and any documents he has in his individual capacity are subject to service of process.

Nothing in the Court's order precludes the Commission from going forward and effectuating service in a proper way as to Blackfoot.

In regard to the Colfax National Bank, we note as follows: That Colfax National was also subpoenaed to produce documents. Its lawyer has contended today that it will obey any Court order. Mr. Blum has called to the Court's attention the pendency of this matter before the State District Court. Chief Judge Lilly on October 6th issued a preliminary injunction stopping the bank from providing any of the requested information.

However, under our view the injunction foresaw action to enforce the SEC's subpoena. It has by its term—the injunction holds that the bank is enjoined from providing the requested information to SEC "till such time as Defendant is ordered to do so by another Court of competent jurisdiction."

The order doesn't say what Colorado authority they are proceeding under. The bank appears to be cooperative. They just want an order. The case of *United States vs. Miller,* 425 U.S. 435 has held that a bank depositor has no protectible Fourth Amendment interest in bank records relating to his account as these are business records of the bank, not customer's private records.

Also, there is no expectation of privacy since nonconfidential communications, information voluntarily conveyed to the bank and exposed to its employees would be immune from the purview of the subpoena.

We are directing the Colfax National Bank to respond and honor the subpoena. We likewise are cognizant of the case of *United States vs. Continental Bank and Trust Com-*

pany, 503 Federal 2d 45, a 1973 Tenth Circuit case where, in that case, the bank failed to show it incurred expenses over and above those reasonably incurred in the ordinary course of business.

The Court is not at this time determining those costs. The Court has made mention that there should be every effort to cooperate in minimizing the cost to the bank. However, the Court will ask the parties to amicably try to resolve any questions of costs.

I think that there is a growing tendency if the costs are outside the ordinary course of business, that they may, in the discretion of the Court be recoverable. I think as a balancing test, the Court will make no adjudication at this time.

Can Counsel understand the Court's general observation that the question is open should the bank ultimately feel that there has been unnecessary costs.

However, the Court is entering a final judgment in this regard that no costs will be awarded with leave of Court to ask for post-trial relief should this prove to the contrary.

The Court, in furtherance of the request of the Petitioner in this case will direct that, with the exception of Blackfoot Bituminous, that all other Respondents comply with the subpoenas and appear before designated officials at the Securities and Exchange Commission at the Denver Regional Office of the Securities and Exchange Commission, Room 640, 2 Park Central Building, 1515 Arapahoe Street, Denver, Colorado, 80202, at a time to be mutually agreed upon by the parties, but in no event later than the 15th of March.

The Court is designating that commensurate with other commitments of the litigants and parties that the period be between the 15th of February and the 15th of March, but in no event be on the 15th of March.

And at that time the Respondents are to produce the records that have been designated, and respective subpoenas.

We further order that—and, Mr. Amy, the Court will ask you to prepare a written final judgment in this case. It should be shared with Counsel. Read to Counsel. I am not

asking Counsel for response to approve it, but they should have cognizance of it, and I care to have this done by 5:00 tonight.

MR. AMY: Yes, Your Honor, that will be done, Your Honor.

THE COURT: The recitals should include also that in no event shall the information gained by the SEC be shared with any other Governmental agency without an express order of this Court.

That the information sought shall be kept with full integrity within the confines of the SEC, and pursuant to their private investigation and their order enforcing the subpoenas.

Do you understand, sir?

MR. AMY: Yes, I do, Your Honor.

THE COURT: Also, the order should—final judgment should incorporate by reference that the Court delivered its oral findings of fact and conclusions of law, and that they are expressly incorporated in the final judgment.

In line with the Court's ruling today that there has not been proper service of process on Blackfoot, Mr. Treece, is it agreeable to you, please, that at this time the Court dismiss without prejudice the 79-F-56 case so that in the event the procedure is triggered again, you may either respond by way of answer or other defenses, or file such an action again?

MR. TREECE: No, Your Honor. What we would propose to do would be to stipulate that the Court's order today is determinative of the issues in that case, and we would offer, therefore, to submit to an adverse judgment in that case as a consequence of the collateral estoppel that would—or res judicata that would attach to that action.

THE COURT: In effect, Counsel you will submit the 79-F-56 case without argument that the Court may—

MR. TREECE: We would stipulate actually that the Court's rule today is res judicata of the issues raised in the 79-F-56 case, and, therefore, that we should be consistent and suffer an adverse judgment in that case.

THE COURT: I am concerned about the type of judgment that would enter in that case so it will be final judg-

ment, you understand for our Clerk's Office. That's what I am concerned about, and also that any appeal period will commence running.

MR. TREECE: It should. Well, since we sought an injunction, Your Honor, I guess the proper entry of the order would be to just enter judgment against the Defendants and order that they, the Plaintiffs, in order that they take nothing by their complaint.

THE COURT: Are you requesting the Court to enter certain findings in regard to the 56 case, in regard to relief requesting—

MR. TREECE: We are saying, Your Honor, that the findings, at least insofar as they relate to the questions raised about the propriety of the formal order, are applicable to this case and dispositive of it.

THE COURT: The Court will consider—Counsel, it's agreeable to the Court. The Court further will deny the relief requested therein. The Court denies the request that the Court should rescind the order of the SEC in its entirety.

The Court will deny the request, or the procedure that the subpoenas heretofore issued pursuant to said order should be vacated and quashed. However, we have entered other orders as to the legal sufficiency of the subpoenas as it affects Blackfoot. However, we have held that in regard to P & J Coal Company, that service of process is proper.

We will deny any request in regard to the prayer that the Court should restrain the issuance of subpoenas as we are expressly making no determination as to whether additional subpoenas as to Blackfoot should issue in this case. All other relief is denied.

And insofar as applicable, the Court would deny the relief requested in the complaint. The Defendants, as I take it, the Plaintiffs will present no testimony in regard to the 56 case. You will ask the arguments, the briefs submitted in the other two cases be considered by the Court in the 56 case?

MR. TREECE: That's correct, Your Honor.

THE COURT: The Court finds the issues joined in favor of the Defendant in the 56 case and against the Plaintiffs.

The Plaintiffs shall take nothing by their action, and judgment shall enter in favor of the Defendant in the 56 case and against the Plaintiffs.

Any record arguments that have been submitted to the Court in the two other cases shall equally apply to the 79-F-56 case. However, the Court has not consolidated the three cases. The Court has accepted Counsel's statement that we may use the same evidence, but the Court is not consolidating the 56 case with the other two cases.

The request to consolidate will be denied. If the Court consolidates the cases, I feel there might be some procedure problems. However, the Court is not consolidating the 56 case.

The Court understands the Plaintiffs in the 56 case will not request any answer to be filed, but understand the position of the SEC would be harmonious to their position advanced in the other two cases. Is that correct, please?

MR. AMY: Right. We will so stipulate, Your Honor.

THE COURT: Judgment will enter for the Defendant in the 56 case. Each party to pay their own respective costs, as the case might be in the 56 case.

Anything further on behalf of the Plaintiffs or the Applicants in this case?

MR. KRYS: No, Your Honor.

THE COURT: Anything further on behalf of the Respondents, please?

MR. TREECE: Yes, Your Honor. Might I inquire about the possibility of a stay of the Respondent and the Plaintiff in 56?

THE COURT: That's why the Court tried to set a long enough period before there should be compliance. Is there any reason why any compliance in this case could not, rather than take place between the 15th of February and the 15th of March, that this be set, all compliance should be by the 1st of April with the request that the cooperation be between the 15th of March and the 1st of April?

So that if Counsel—and that a stay of execution may proceed for a period of—well, until the 10th of February. Any objection in that regard so Counsel may study the possibility of appeal on the two cases?

MR. KRYS: If I may repeat something. The appeal time, because the Government is involved, as I understand, is what? Sixty days for the filing of the notice of appeal? However, as I understand it, the subpoena enforcement actions are supposed to be determined expeditiously since the Supreme Court has indicated that, and it would seem to us, since no action, nobody is required to do anything until February 15th, and since the Respondents had been aware of the issues, all the factual matters involved, they could decide whether or not they are going to appeal it before the 15th of February.

And if they do decide to appeal, then they could apply for a stay of this Court or the Court of Appeals. We generally would oppose the stay beyond the 15th of February because this investigation has been frustrated now by the Respondents' activities for well over six months, or approximately—not quite six months. Almost six months.

THE COURT: Counsel, you won't argue with granting a stay until the 1st of March, will you?

MR. KRYS: All right, 1st of March.

THE COURT: Mr. Treece, is this agreeable to you, please?

MR. TREECE: Yes, Your Honor. That would suffice for now. And give us an opportunity to get a record, and—

THE COURT: The Court will grant the stay until the 1st of March. The Court will determine that there be compliance with this order between the 1st of March to the 15th of March, unless this Court grants an additional stay, or, in the event a notice of appeal is lodged and a further appeal stay is granted by the Tenth Circuit.

MR. TREECE: I am sorry. Will you say that again?

THE COURT: In effect, I am saying the Court is granting a stay of execution on this order until the 1st of March. However, the Court is directing, so that we have a definitive date, and so that the Circuit will know there is some imminency, the Court is directing that there be compliance with this order no later than the 15th of March, between the period of the 1st of March and the 15th.

There should be cooperative effort to have this information. Does this answer your question, please?

MR. TREECE: No. What I wasn't sure of is whether Your Honor was saying in the event we needed a stay, further stay in connection with the taking of appeal, whether we had the right to apply here, or you were directing us to make further application to the Circuit.

THE COURT: I suggest that if a notice of appeal is filed, the stay ought to come from the Tenth Circuit.

MR. TREECE: That's what I thought.

THE COURT: If the notice of appeal is filed, it's not clear. So we've got some ground rules, I prefer—I grant a stay until the 1st of March. I don't want two Courts getting involved in it, but there should be compliance between the 1st and 15th of March, and we have got an end date, and any further stays beyond that time would have to be prefaced on notice of appeal filed in the Circuit, and also any additional stay granted by the Circuit.

Does this answer your question, please?

MR. TREECE: Yes, I understand.

THE COURT: Anything further on behalf of the Plaintiffs, please?

MR. KRYS: No, Your Honor.

THE COURT: Anything further on behalf of Respondents?

MR. TREECE: No, Your Honor.

THE COURT: I appreciate the very professional way in which the case has been presented. Do you have any questions, Mr. Blum?

MR. BLUM: No, Your Honor, not at this point.

THE COURT: Thank you very much. Court will be in recess, please. The Court would request that an order be prepared in the form that the Court has prescribed, and read it to Mr. Treece or Counsel over the telephone. Mr. Blum over the telephone.

I think you know the form that the Court wants, or has used in other cases with the recitals, the additional recitals.

I will ask you to read it to Counsel merely so they know about it. I care to have it submitted to the Court by 5:00 this afternoon, however, so we have got a final judgment that will enter today.

You will take no action on the facts that Counsel—any procedural advantage that the Court is granting Counsel until the 1st of March in which a stay is granted, even though the final judgment would probably enter today, and nothing is done until the 1st of March.

You are not going to raise any procedural question in that regard; is that correct, please?

MR. KRYS: That's correct.

THE COURT: You understand this to be the case, Mr. Treece?

MR. TREECE: Yes, Your Honor, I do so understand.

THE COURT: Court will be in recess, please.

(Whereupon, this hearing was then concluded at the hour of 11:00 o'clock a.m. this date.)

REPORTER'S CERTIFICATE

I, Suzanne M. Claar, Certified Shorthand Reporter and Official Reporter to this Court, do hereby certify that I was present at and reported in shorthand the proceedings in the foregoing matter; that I thereafter reduced my shorthand notes to typewritten form, comprising the foregoing official transcript; further, that the foregoing official transcript is a full and accurate record of the proceedings in this matter on the date set forth.

Dated at Denver, Colorado, this 12th day of February, 1979.

/s/ _____

Suzanne M. Claar, RPR

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MAY TERM — June 9, 1980

Before Honorable Robert H. McWilliams, Honorable Jean S. Breitenstein and Honorable James K. Logan, Circuit Judges

SECURITIES AND EXCHANGE COMMISSION,
Applicant-Appellee,
v.
BLACKFOOT BITUMINOUS, INC. and COLFAX NATIONAL BANK,
Respondents,
STANLEY DRIZIN, WILLIAM A. KILPATRICK, JOHN JEWELL, MYRON BJERKAAS, FRANCES GRAHAM, DECLAN J. O'DONNELL and RICHARD PETERMAN,
Respondents-Appellants.
SECURITIES AND EXCHANGE COMMISSION,
Applicant-Appellee,
v.
P & J COAL COMPANY, INC. and JOHN H. PETTINGILL,
Respondents-Appellants.
BLACKFOOT BITUMINOUS, INC., and P & J COAL COMPANY, INC.,
Plaintiffs-Appellant,
v.
UNITED STATES SECURITIES AND EXCHANGE COMMISSION,
Defendant-Appellee.

JUDGMENT

No. 79-1130
No. 79-1131

(D.C. Nos. 78-F-1149 and
79-F-56)

Teste

Howard K. Phillips,
Clerk, U.S. Court of
Appeals, Tenth Circuit
By: Vicki Edmisson
Deputy Clerk

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

HOWARD K. PHILLIPS, Clerk

APPENDIX E

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS PRINCIPALLY INVOLVED

Amendmenment IV, Constitution of the United States, 1 U.S.C. Page L (1976):

ARTICLE [IV.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V, Constitution of the United States, 1 U.S.C. Page L (1976):

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECURITIES ACT OF 1933

Title 15 United States Code §77s(b) (1976):

§77s. Special powers of Commission

. . .

(b) For the purpose of all investigations which, in the opinion of the Commission, are necessary and proper for the enforcement of this subchapter, any member of the

Commission or any officer of officers designated by it are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States or any Territory at any designated place of hearing.

Title 15 United States Code §77t(a) (1976):

§77t. Injunctions and prosecution of offenses
(a) Investigation of violations

Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this subchapter, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

Title 15 United States Code §77v(a)(b) (1976):

§77v. Jurisdiction of offenses and suits

(a) The district courts of the United States, and the United States courts of any Territory, shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter.

. . .

(b) In case of contumacy or refusal to obey a subpoena issued to any person, any of the said United States courts, within the jurisdiction of which said per-

son guilty of contumacy or refusal to obey is found or resides, upon application by the Commission may issue to such person an order requiring such person to appear before the Commission, or one of its examiners designated by it, there to produce documentary evidence if so ordered, or there to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

SECURITIES EXCHANGE ACT OF 1934

Title 15 United States Code §78u(a)(b)(c) (1976):

§78u. Investigations and actions

(a) Authority and discretion of Commission to investigate violations

The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter, the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of such provisions, in the prescribing of rules and regulations under this chapter, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this chapter relates.

(b) Attendance of witnesses; production of records

For the purpose of any such investigation, or any

other proceeding under this chapter, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) Judicial enforcement of investigative power of Commission; refusal to obey subpoena; criminal sanctions

In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof....

CODE OF FEDERAL REGULATIONS (C.F.R)

Vol. 17 C.F.R. Commodity and Securities Exchanges **(1978; 1979)**

Part 200—Organization; Conduct and Ethics; and Information and Requests

. . .

Subpart C—Canons of Ethics.

. . .

§200.54 Constitutional obligations.

The members of this Commission have undertaken in their oaths of office to support the Federal Constitution. Insofar as the enactments of the Congress impose executive duties upon the members, they must faithfully execute the laws which they are charged with administering. Members shall also carefully guard against any infringement of the constitutional rights, privileges, or immunities of those who are subject to regulation by this Commission.

. . .

§200.66 Investigations.

The power to investigate carries with it the power to defame and destroy. In determining to exercise their investigatory power, members should concern themselves only with the facts known to them and the reasonable inferences from those facts. A member should never suggest, vote for, or participate in an investigation aimed at a particular individual for reasons of animus, prejudice or vindictiveness. The requirements of the particular case alone should induce the exercise of the investigatory power, and no public pronouncement of the pendency of such an investigation should be made in the absence of reasonable evidence that the law has been violated and that the public welfare demand it.

. . .

Subpart I—Regulations Pertaining to Public Observation of Commission Meetings.

. . .

§200.401 Definitions.

. . .

(f) The term "likely to," as used in §200.402, illustrating the circumstances under which Commission meetings may be closed, and the circumstances in which information may be deleted from the notice of

Commission meetings, means that it is more probable than not that the discussion of Commission business, or publication of information, reasonably could encompass matters which the Commission is authorized, by the Government in the Sunshine Act, Pub. L. 94-409, as implemented by this subpart, to consider or discuss at a closed meeting (or a closed portion of a meeting).

Part 202—Informal and Other Procedures

§202.1 General.

. . .

(c) The statutes and the published rules, regulations and forms thereunder prescribe the course and method of formal procedures to be followed in Commission proceedings. These are supplemented where feasible by certain informal procedures designed to aid the public and facilitate the execution of the Commission's functions. There follows a brief description of procedures generally followed by the Commission which have not been formalized in rules.

. . .

§202.5 Enforcement activities.

(a) Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission, which may then order a formal investigation or examination if it is deemed

necessary. Unless otherwise ordered by the Commission, the investigation or examination is nonpublic and the reports thereon are for staff and Commission use only.

(b) Where it appears after investigation or otherwise that there has been a violation of any of the provisions of the acts administered by the Commission or the rules or regulations thereunder, the Commission may take one or more of the following actions: institution of administrative proceedings looking to the imposition of remedial sanctions, initiation of injunction proceedings in the courts, and, in the case of a willful violation, reference of the matter to the Department of Justice for criminal prosecution. The Commission may also on some occasions refer the matter to other Federal agencies, State authorities or organizations such as the stock exchanges or the National Association of Securities Dealers, Inc.

(c) Persons who become involved in preliminary or formal investigations may, on their own initiative, submit a written statement to the Commission setting forth their interests and position in regard to the subject matter of the investigation. Upon request, the staff, in its discretion, may advise such persons of the general nature of the investigation, including the indicated violations as they pertain to them, and the amount of time that may be available for preparing and submitting a statement prior to the presentation of a staff recommendation to the Commission for the commencement of an administrative or injunction proceeding. Submissions by interested persons should be forwarded to the appropriate Division Director or Regional Administrator with a copy to the staff members conducting the investigation and should be clearly referenced to the specific investigation to which they relate. In the event a recommendation for the commencement of an enforcement proceeding is presented by the staff, any submissions by interested persons will be forwarded to the Commission in conjunction with the staff memorandum.

(d) In instances where the staff has concluded its investigation of a particular matter and has determined that it will not recommend the commencement of an enforcement proceeding against a person, the staff, in its discretion, may advise the party that its formal investigation has been terminated. Such advice if given must in no way be construed as indicating that the party has been exonerated or that no action may ultimately result from the staff's investigation of the particular matter.

Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-373

In the Supreme Court of the United States

OCTOBER TERM, 1980

STANLEY DRIZIN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-373

STANLEY DRIZIN, ET AL., PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in a summary subpoena enforcement proceeding arising out of a Securities and Exchange Commission investigation into possible violations of the federal securities laws, mere allegations by the recipients of the subpoenas that securities law violations were not likely or probable when the Commission commenced the investigation preclude enforcement of the subpoenas.

2. Whether, as a prerequisite to enforcing its subpoenas, the Commission must prove that none of the requested documents is already in its possession.

3. Whether the district court's finding that the Commission did not already possess the subpoenaed documents is clearly erroneous.

4. Whether the court of appeals correctly rejected petitioners' unsupported allegation that the Commission was engaged in a "fishing expedition."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 622 F. 2d 512. The opinions of the district court (Pet. Apps. B and C) are not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. D) was entered on June 9, 1980. The petition for a writ of certiorari was filed on September 8, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In August 1978, the Securities and Exchange Commission ordered that a nonpublic investigation be made to determine whether petitioners had violated or were about to violate registration and antifraud provisions of the federal securities laws. That order was based on information reported by the Commission's staff that indicated that petitioners were selling unregistered securities and were making material misrepresentations in connection with the sale of those securities. During August and September 1978, investigative subpoenas *duces tecum* issued pursuant to that order were served on petitioners and others (I R. 1–56, 60–92).[1] Those subpoenas sought testimony and documents relevant to the Commission's investigation.

Petitioners failed to appear to testify and produced no documents. Furthermore, they made no attempt to resolve any disagreement concerning the subpoenas with the Commission or its staff. In November 1978, the Commission instituted two subpoena enforcement actions in the United States District Court for the District of Colorado.[2]

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[1] "R." refers to the three-volume record filed in the court of appeals in case No. 79-1130.

[2] *SEC* v. *Blackfoot Bituminous, Inc.*, No. 78-F-1149 (filed Nov. 1, 1978); *SEC* v. *P & J Coal Co.*, No. 78-F-1247 (filed Nov. 28, 1978). These cases were consolidated in the district court.

Prior to the hearing in those cases, petitioners filed a complaint against the Commission in the same district court[3] and served the Commission with extensive discovery requests directed toward "unearthing the testimony and documentation known to the Commission as the basis of a 'likelihood' of violations when it voted for the investigative order * * *" (Pet. 6–7).[4] Petitioners claimed that the Commission had not complied with 17 C.F.R. 202.5(a) because it purportedly had failed to find that there was a likelihood of violations when it issued its order of investigation. Petitioners accordingly demanded that the Commission's investigation be enjoined and that the subpoenas be quashed.

In January 1979, the district court entered an order enforcing the Commission's subpoenas (Pet. App. C). Relying on this Court's decision in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), it held that enforcement of the subpoenas was appropriate because the Commission had demonstrated that the information sought was reasonably relevant to an authorized and lawful inquiry of the Commission (Pet. App. C–3, C–7),[5] that the demands were not too indefinite and did not encompass material that was privileged or otherwise exempt from disclosure (*id.* at C–7), that compliance would not be unreasonable or un-

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[3] *Blackfoot Bituminous, Inc.* v. *SEC*, No. 79–F–56 (filed Jan. 18, 1979).

[4] Petitioners sought to discover, *inter alia*, "the manner of the Commission's deliberations" (Interrogatory 3), "the documents considered by each commissioner prior to the issuance of the order" (Interrogatory 4), "the significant facts pertinent to the referenced matter substantiated by either the documents considered or statements considered" (Interrogatory 6), the contribution of officials other than the Commissioners in determining whether to order a private investigation (Interrogatories 7–9), and the nature of any complaints made against petitioners by the public (Interrogatory 10).

[5] In addition to finding that the documents sought were relevant, the district court found that petitioners had made no effort to work out their purported differences regarding the scope of the subpoenas with the Commission (Pet. App. C–8). The court noted that this provided an additional ground for rejecting petitioners' "overbreadth" arguments.

duly burdensome (*ibid.*), and that the Commission had shown prima facie that it "does not have the information requested" (*id.* at C-3). In response to petitioners' claim that the Commission had not demonstrated compliance with 17 C.F.R. 202.5(a), the court pointed out that this provision is merely descriptive of informal procedures generally followed by the Commission, and is not a binding rule (Pet. App C-6). The court also concluded that, in any event, the Commission had complied with 17 C.F.R. 202.5(a) (Pet. App. C-6). Finally, the district court declined to permit discovery into the deliberative processes leading to the investigation (*ibid.*).[6]

Following the district court's ruling in favor of the Commission in the subpoena enforcement proceedings, petitioners' counsel agreed to entry of "an adverse judgment" in the suit against the Commission because of the *res judicata* or collateral estoppel effect of the district court's decision (Pet. App. C-13 to C-14).

On consolidated appeals in all three actions, the court of appeals affirmed (Pet. App. A-1 to A-7). The court observed that all the "necessary showings for judicial enforcement [of a subpoena] were met in this case" (*id.* at A-4). It also held that the Commission need not establish "probable cause" or a "likelihood" of violations before commencing an investigation (*id.* at A-5), and that the Commission had a legitimate need for the materials that it sought (*id.* at A-6). The court further rejected petitioners' claim that the Commission was conducting a "fishing expedition," noting that petitioners had made no attempt to narrow the range of materials requested and had not presented any complaints about the subpoenas to the Commission or its staff (*ibid.*).[7]

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[6]The Commission partially responded to petitioners' discovery requests by informing them that the members of the Commission had considered and voted unanimously to issue the order of investigation and also by making a copy of the Commission's order available to petitioners.

[7]The court of appeals declined to reach petitioners' contention that the district court erred in denying discovery. Petitioners conceded that

ARGUMENT

The decision of the court of appeals correctly applies well-established legal principles to the facts of this case and does not conflict with any decision of this Court or any other court. Further review is therefore unwarranted.

1. Section 21(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(a), empowers the Commission "in its discretion [to] make such investigations as it deems necessary to determine whether any person has violated, is violating, or is about to violate" that Act or any rules or regulations thereunder. See also Section 20(a) of the Securities Act of 1933, 15 U.S.C. 77t(a). In aid of this investigatory power, the Commission is authorized to "subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry," and to "invoke the aid of [an appropriate district] court * * * in requiring the attendance and testimony" called for by the subpoena. Sections 21(b) and 21(c) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(b) and 78u(c). See also Sections 19(b) and 22(b) of the Securities Act of 1933, 15 U.S.C. 77s(b) and 77v(b). There is no requirement in these statutes that the Commission delay investigation until it can prove "probable cause" or "likelihood" of the very violations it seeks to investigate.

The holding of the court of appeals that the Commission is not required to prove a likelihood of violations to enforce its subpoena is consistent with settled legal principles. The purpose of an investigation is not to accuse but to inquire; not to prove a pending charge but "to discover and procure evidence * * * upon which to make one if * * * the facts thus discovered should justify doing so." *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 201 (1946). See *United States* v. *Bisceglia*, 420 U.S. 141, 146 (1975). The Commission is not required "to answer at the outset of its

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the trial court did not err if, as the court of appeals held, 17 C.F.R. 202.5(a) does not require the Commission to demonstrate a likelihood of violations (Pet. App. A-6).

investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." *SEC* v. *Savage*, 513 F. 2d 188, 189 (7th Cir. 1975).[8] See *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co.* v. *Walling*, *supra*; *Endicott Johnson Corp.* v. *Perkins*, 317 U.S. 501 (1943).

2. In urging that the Commission is required to prove a likelihood of violations before its subpoenas may be enforced, petitioners do not rely on the Constitution or any statute. Rather, they rely exclusively on the informal description of the Commission's enforcement procedures contained in 17 C.F.R. 202.5(a). That regulation describes the usual Commission staff practice when the Commission discovers that there is a likelihood that a violation has been or is about to be committed and the issuance of process becomes necessary.[9] 17 C.F.R. 202.5(a) is merely descrip-

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[8] Accord, *SEC* v. *Dresser Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97, 573, at 97,998 n.28 (D.C. Cir. July 16, 1980) (en banc), petition for cert. pending, No. 80-354; *Dresser Industries, Inc.* v. *United States*, 596 F.2d 1231, 1235 n. 1 (5th Cir. 1979), cert. denied, 444 U.S. 1044 (1980); *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974); *SEC* v. *First Security Bank of Utah*, 447 F.2d 166, 168 (10th Cir. 1971), cert. denied, 404 U.S. 1038 (1972); *SEC* v. *Wall Street Transcript Corp.*, 422 F.2d 1371, 1375 (2d Cir.), cert. denied, 398 U.S. 958 (1970); *Consolidated Mines* v. *SEC*, 97 F.2d 704, 708 (9th Cir. 1938); *In re SEC*, 84 F.2d 316, 318 (2d Cir.), rev'd on mootness grounds, 299 U.S. 504 (1936).

[9] 17 C.F.R. 202.5(a) provides:

> Where, from complaints received from members of the public, communications from Federal or State agencies, examination of filings made with the Commission, or otherwise, it appears that there may be violation of the acts administered by the Commission or the rules or regulations thereunder, a preliminary investigation is generally made. In such preliminary investigation no process is issued or testimony compelled. When it appears from information obtained either with or without a preliminary investigation that there is a likelihood that a violation has been or is about to be committed and that the issuance of process may be necessary, the matter is reported to the Commission, which may

tive; it is not a provision requiring the Commission to find probable cause or a likelihood of violations before commencing an investigation, as both courts below correctly held (Pet. App. A-5, C-6). See also *SEC* v. *Dresser Industries, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,573, at 97,998 n.28, 98,006 (D.C. Cir. July 16, 1980) (en banc), petition for cert. pending, No. 80-354. Petitioners cannot point to a single judicial decision adopting a different interpretation of this provision.[10]

Petitioners also err in contending that 17 C.F.R. 202.5(a) is a substantive rule (Pet. 11). As this Court and the lower courts frequently have held, not every agency guideline or provision creates rights in persons potentially affected by that provision.[11] Unlike the provision at issue here, the Commission's substantive rules relating to investigations appear at 17 C.F.R. Part 203, entitled "Rules Relating to Investigations," and, by incorporation, in portions of 17 C.F.R. Part 201, entitled "Rules of Practice." These regulations provide specific protections in Commis-

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then order a formal investigation or examination if it is deemed necessary. Unless otherwise ordered by the Commission, the investigation or examination is nonpublic and the reports thereon are for staff and Commission use only.

[10] By its express terms, 17 C.F.R. 202.5(a) describes the usual procedure followed by the staff when there is a likelihood of violations—*i.e.*, the staff reports that information to the Commission. It has no application to situations in which there is no established likelihood of a violation but the Commission nevertheless believes that there is a good reason to investigate.

[11] See, *e.g.*, *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970); *Sullivan* v. *United States*, 348 U.S. 170, 172-174 (1954); *Silverman* v. *CFTC*, 549 F. 2d 28, 34 (7th Cir. 1977); *United States* v. *Lockyer*, 448 F. 2d 417, 420, 421 (10th Cir. 1971); *Modern Plastics Corp.* v. *McCulloch*, 400 F. 2d 14, 18-19 (6th Cir. 1968). Cf. *United States* v. *Caceres*, 440 U.S. 741 (1979).

Service v. *Dulles*, 354 U.S. 363 (1957) and *United States ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954), on which petitioners rely (Pet. 19), are irrelevant to the present case. Nothing in those cases suggests that the provisions involved were only "generally" followed or that they were purely "descriptive" rather than mandatory. Moreover, the rules at issue in those cases were designed to confer procedural rights on parties dealing with the agency.

sion investigations. The provision on which petitioners rely, in contrast, appears at 17 C.F.R. Part 202, which consists of "brief description[s]" of certain "Informal and Other Procedures." See 17 C.F.R. 202.1(c). These regulations summarize procedures that are "generally followed" but that "have not been formalized in rules." *Ibid.*

In any event, the Commission did explain its reason for believing that violations of the law may have occurred and that an investigation was required (see Pet. App. C-4). The Commission's August 1978 order of investigation stated expressly that the Commission's records disclosed that petitioners had not filed a registration statement. It also stated that the Commission possessed information received from its staff that tended to show that petitioners had sold unregistered securities and had engaged repeatedly in misrepresentations of material fact. In the context of a subpoena enforcement proceeding, such a recitation is more than sufficient. It demonstrates that the Commission did find a likelihood of violations, even though it was not required to do so.[12]

3. Petitioners also argue (Pet. 22-24) that, under *United States* v. *Powell*, 379 U.S. 48 (1964), the Commission was required to prove that it did not already have the documents that it requested.

However, in this case the district court found that the Commission had made a sufficient showing that it did not possess the records sought, and the court of appeals did

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[12] Petitioners' assertion that they were denied discovery into the processes leading to the Commission's decision to investigate and into the evidence before the Commission at the time it decided to investigate is meritless. In Commission subpoena enforcement actions, which are summary in nature, "[d]iscovery should be permitted only where the respondent is able to distinguish himself from 'the class of the ordinary [respondents]' * * * by citing special circumstances that raise doubts about the agency's good faith." *SEC* v. *Dresser Industries, Inc.*, *supra*, at 98,006 (citations omitted). Without this limitation, summary enforcement of agency subpoenas would be the exception rather than the rule. See also *Donaldson* v. *United States*, 400 U.S. 517, 529 (1971); *FTC* v. *Texaco, Inc.*, 555 F. 2d 862, 871-872 (D.C. Cir.) (en banc), cert. denied, 431 U.S. 974 (1977).

not disturb that finding (Pet. App. C-3, A-6). Petitioners have done nothing more than speculate that the Commission may already have some of the records (Pet. 23). In any event, there is no requirement that the Commission make such a demonstration as a prerequisite for enforcing its subpoenas.

Powell involved the construction of a provision of the Internal Revenue Code (26 U.S.C. 7605(b)) that was intended, with certain exceptions, to bar repeated examinations of a taxpayer's records for a single taxable year. The provision was designed to deal with the problem of " 'unnecessary visits and inquisitions after a thorough examination is supposed to have been had." 379 U.S. at 54. In construing that provision, this Court noted that it "does appear to require that the information sought is not already within the Commissioner's possession * * *." *Id.* at 56. That requirement stemmed from the plain text of the statute, which prohibited "unnecessary" and repetitious examinations. The more general statutes authorizing the Commission's subpoena do not contain comparable language, and there is no sound reason to imply such a limitation. The Commission's subpoena should be enforced upon a showing that "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 652; *Oklahoma Press Publishing Co.* v. *Walling*, *supra*, 327 U.S. at 209; *Endicott Johnson* v. *Perkins*, *supra*, 317 U.S. at 509. Both courts below correctly found that those standards were satisfied here.

The asserted conflict among the circuits on this point (Pet. 22-24) is nonexistent. In neither of the cases cited by petitioners was it even contended, much less found, that enforcement should be denied because the agency already possessed the subpoenaed documents.[13] The courts simply

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[13] *CFTC* v. *First Nat. Bullion Corp.*, 461 F. Supp. 659, 661 (S.D.N.Y. 1978), aff'd without opinion, 598 F.2d 609 (2d Cir. 1979); *SEC* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1053 (2d Cir. 1973), cert. denied, 415 U.S. 915 (1974).

cited the discussion in *Powell* in cases in which there was no issue concerning the agency's prior possession of the materials. We are aware of no decision denying enforcement of a Commission subpoena on the ground that the Commission may already possess some of the documents sought.

4. Petitioners contend that the Commission's subpoenas should be denied enforcement because of alleged overbreadth. But both the district court and the court of appeals found that the materials requested by the Commission were relevant to its investigation (Pet. App. A-6, C-3, C-7).[14] Moreover, petitioners made no effort to discuss with the Commission any purported disagreements concerning the scope of the subpoenas (*id.* at A-6, C-8). That factor alone demonstrates that petitioners' "overbreadth" claims are without merit. *United States* v. *Morton Salt Co.*, *supra*, 338 U.S. at 653. See also *McPhaul* v. *United States*, 364 U.S. 372, 382 (1960); *United States* v. *Bryan*, 339 U.S. 323, 332 (1950).

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[14] The standard of relevance for agency investigations is met if the documents sought are "not plainly incompetent or irrelevant to any lawful purpose." *Endicott Johnson Corp.* v. *Perkins*, *supra*, 317 U.S. at 509. The standard must be a broad one for, as is true of grand jury investigations, the Commission's inquiry may not be complete "until every available clue has been run down and all witnesses examined in every proper way * * *." *United States* v. *Stone*, 429 F.2d 138, 140 (2d Cir. 1970).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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